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IN THE

Supreme Court of the United States

JUNE TERM 1970

No. 1492

S.T.G. CONSTRUCTION CO., INC.,
Petitioner,

—against—

STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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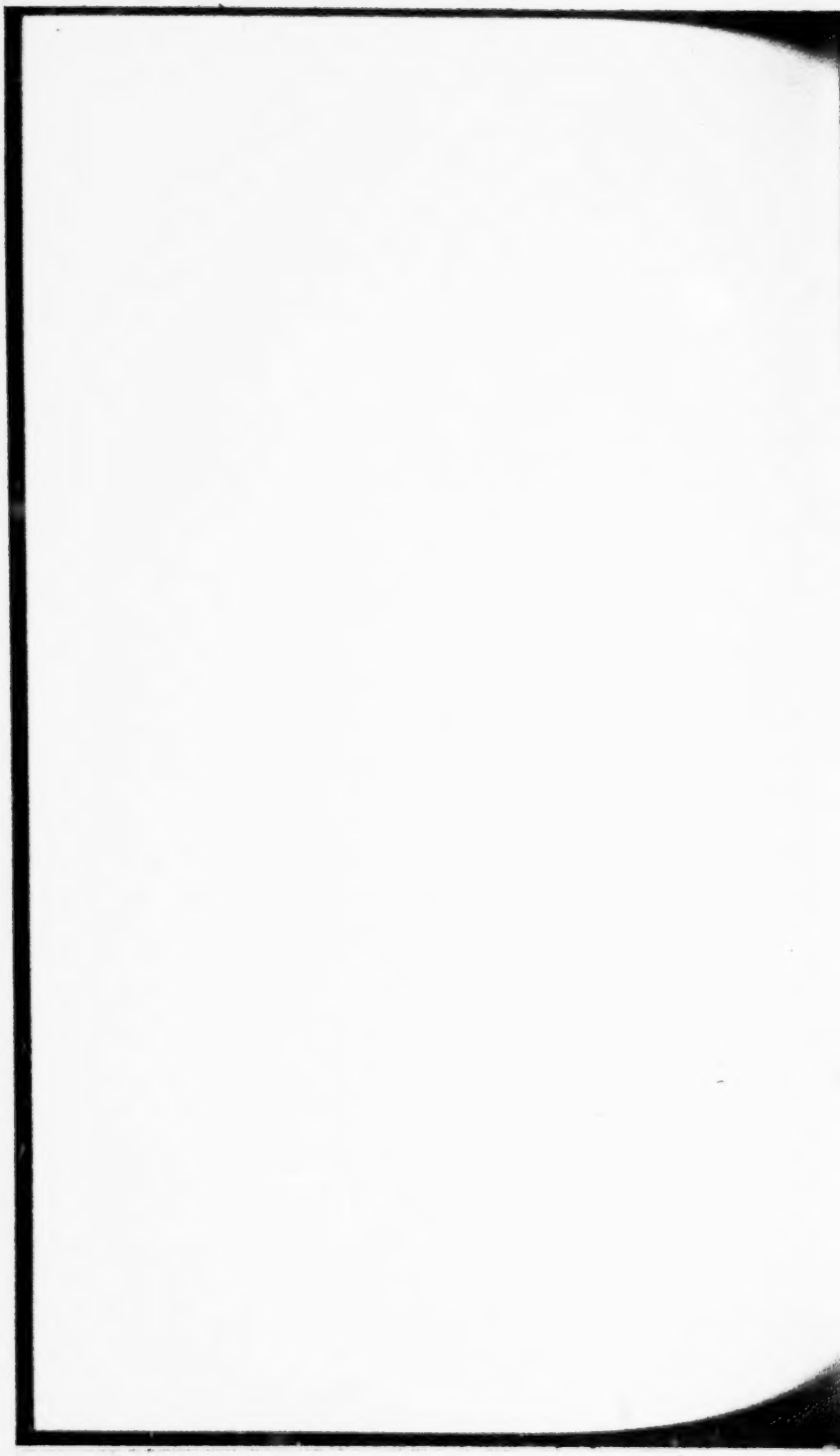

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No.

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—against—

STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Hon. Justices of the Supreme Court:

Petitioner, S.T.G. Construction Co., Inc. prays that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on January 26, 1970.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is unreported. The opinion of the United States District Court for the Southern District of New York is

unreported. Copies of said opinions are appended hereto (appendices "A" and "E").

Jurisdiction of the Court

i) The United States Court of Appeals for the Second Circuit rendered a decision on which judgment was entered on January 26, 1970, affirming a judgment entered on December 30, 1968, in the United States District for the Southern District Court for the Southern District of New York in favor of respondent the Staten Island Rapid Transit Railroad Company against petitioner S.T.G. Construction Co., Inc. and Continental Casualty Company in the amount of $190,079.52.

ii) The petition for rehearing made by Continental Casualty Company was denied by the Second Circuit on February 24, 1970.

iii) Jurisdiction to review the said judgment by writ of certiorari is invoked under 28 U.S.C. §1254.

Questions Presented for Review

1. Where the plans and specifications for a government financed, competitively bid railroad bridge construction contract require protective steel sheet pile fender cells to be build in strict conformity with detailed methods and procedures, which include blasting a trench in the bedrock to enable the sheet piles to anchor into the rock, and where such detail specifications are concededly dangerous and impracticable, is the contractor responsible to find other methods by which the sheet piles may be driven into the rock, or is it the owner's responsibility to redesign its specifications?

2. Where the owner's admittedly defective detail specifications for sinking the sheet piles into bedrock include the blasting of a trench in the rock by "an approved

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method" to be submitted by the contractor, does this permit an interpretation, as found below, that the contractor was not required to use blasting, but was responsible to submit any other method by which to achieve the desired result of sinking the sheet piles into rock?

Statement of the Case

This action was brought by respondent, the Staten Island Rapid Transit Railroad Company (hereinafter referred to as the "Railroad") a New York corporation, against petitioner, S.T.G. Construction Co., Inc., (hereinafter referred to as "S.T.G."), a New Jersey construction corporation, and its surety, Continental Casualty Company, for alleged excess completion costs resulting from S.T.G.'s alleged breach of a contract for the erection of a Fender Cell System to protect a new railway bridge.

S.T.G. counterclaimed that it had to terminate the contract because the railroad's defective plans prevented its performance, and sought recovery in quantum meruit for the work performed prior to its termination. The District Court attributed the breach to S.T.G. and awarded judgment against it and its surety. The Second Circuit Court affirmed and denied the surety's petition for a rehearing. The surety has not joined in this application for certiorari, and has no further interest in the case.

This contract was the last of a series of three separate and sequential contracts for the erection of the new railway bridge and the demolition of the old bridge it replaced. It is the only contract on which S.T.G. was the contractor. The first contract involved the construction of the piers and approaches for the new bridge; the second was for the erection of the steel superstructure of the new bridge and the removal of the steel swing span of the old bridge (6a).* The third contract, here involved was for

---

*In view of the lengthy Record, references are to the pages of the Appendix submitted to the United States Court of Appeals of the Second Circuit, submitted herewith.

he demolition of the center pier and other structures of the old bridge and the construction of a fender system for the Staten Island Pier of the new bridge (57a). All contracts were financed with federal funds under the Truman-Hobbes Act, 33 U.S.C. §§ 551 et seq., which required competitive bidding based on detailed plans and specifications (1009a). Such plans and specifications were prepared for all contracts by the railroad's architects-engineers, Parsons, Brinckerhoff, Hall & MacDonald.

The third contract was advertised for bids after completion of the first two contracts. S.T.G. was low bidder at $833,140 (60a), and the contract was entered into on January 18, 1960 (1009a). Work was scheduled to be completed within 240 days, or by September 26, 1960, with liquidated damages of $250 per calendar day assessable thereafter unless the delay was excusable.

The demolition was to be performed during the first 120 days, and this, concededly, was done (378a, 1010a, 1154a). The fender system was to be completed within the remaining 120 days, and consisted of eight circular cells, five on the north side, and three on the south side of the Staten Island pier.

The railroad's specifications, on which the job was bid, set forth in detail the method by which the contractor was to build the fender cells. The sheet piles forming the perimeter of the cells were to be driven down to specifid tip elevations approximately 45 feet below the earth surface. This required the sheet piles for the four cells nearest Pier No. 1, on each side, to be driven 10 feet into bedrock, to aid in stabilizing the cell system (30a, 82a-83a, 997a). The specifications stated just how this was to be done, by first driving the sheet piles to rock, then excavating all the earth within the cells so formed, then pumping out the water which would flow into the excavated cells from the adjoining channel, if possible, then blasting a ten foot deep circular trench in the rock be-

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neath the sheet pile tips, by a blasting method to be submitted by the contractor, then driving the piles into the trench and filling the cell with loose stone. (406a-408a, 997a, 1029a-1034a).

It was conceded by the expert witnesses on both sides that such detailed procedures were dangerous and impracticable, since blasting by any method around the circumference of the excavated cell would have resulted in the dangerous "blowing" of the cell from outside pressures. In addition, since the shale rock was subjected to lateral fissures, there would be great danger of undermining the rock supporting the Pier No. 1 (411a-414a, 443a, 444a, 600a, 628a, 630a).

The fundamental legal issue herein is whether this was a detailed specification for the work, on which S.T.G. was entitled to rely, making the Railroad responsible to redesign it, or a result specification, as found by the Courts below, requiring S.T.G.

> ". . . to use any adequate method it desired to sink the cells into the rock." (1156).

The impracticability of the specified blasting procedures is firmly established in the record. S.T.G. ascertained it at the beginning of its work, when it discovered that the same blasting procedures had been specified for the sheet piles forming the Pier No. 1 cofferdam, under prior Contract No. 1, but had been redesigned because of fear of blows (363a, 406a-408a, 428a, 229a, 524a-526a, 553a-539a). The Railroad, in advertising Contract No. 3 for bids, never revealed that it had abandoned these procedures under Contract No. 1.

When S.T.G. reported this, the Railroad's representative, rather than redesign the work, asked S.T.G. to do so. To cooperate, S.T.G. suggested a plan by which an attempt would be made to excavate the rock, not by blasting,

but by drilling holes from the surface with a four inch drill, before the sheet piles were driven and the earth within the cells excavated. This was a completely different design than that specified (418a, 442a).

The Railroad adopted and supervised the substitute plan, which quickly proved unfeasible, since the drills could not be kept in circular alignment through the 35 feet of overburden. At the Railroad's insistance, however, S.T.G., between June and August 1960, vainly tried using larger drills, operated by reputable subcontractors, but it could not achieve alignment, and such large drills were far too slow. (A chronology of attempts to pre-drill is set forth on pages 726a-732a, paragraphs 38, 42-46, 58, 59). All through this period, S.T.G. requested the Railroad to redesign the specifications to effect cell stabilization without requiring the sheet piles to penetrate into rock. This the defendant refused to do (90a-92a, 363a-366a, 391a, 538a-550a, 560a-563a), its architect's representative, Mr. Vaccaro, testifying:

> "It was not our obligation to point out—he asked us to point out methods, but we thought it this was unethical on our part." (908a)

This attitude is all the more startling since the Railroad's project superintendent conceded that Mr. White, of the engineering firm of Spencer, White & Prentis stated, at a job conference, that blasting would be dangerous and should not be used (170a, 569a), and since it was undisputed that Mr. McKinley, the project superintendent of Spencer, White & Prentis, Messrs. Kuessel and Vaccaro, representing the architects, Parsons, Brinckerhoff, Mr. Pasquale the approved blasting subcontractor, and Messrs. Mulstay and Cannon, of the DuPont Power Division, all agreed, at job conferences, that blasting was too dangerous to use (566a, 568a, 569a). Mr. Vaccaro, who had aided in the preparation of plaintiff's case for trial (904a),

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never denied such statements were made by him and in his presence.

Furthermore, the blasting procedures specified never were used to complete the fender cell system. In August 1960 S.T.G., suggested the use of the Spencer, White & Prentis "built-in-caisson" design to stabilize the cells by drilling several large holes into the interior of the cell, into which steel H beams would be concreted, thus eliminating the need to sink the sheet piles into the rock.

When the railroad delayed in accepting this redesign, S.T.G., on October 27, 1960, discontinued operations under the defective original design (101a, 104a, 397a, 398a).

Thereafter, in December 1960, the railroad and S.T.G. did agree to use the "built-in-caisson" design, subject to approval of the Army Engineers (1048a, 1050a). However, after obtaining such approval, the railroad, on February 16, 1961, refused to permit S.T.G. to proceed under such redesign unless it agreed to accept an assessment of $53,500.00 in liquidated damages (126a, 127a, 1057a-1058a, 1061a-1063a).

As a result, S.T.G., on April 27, 1961, terminated the contract (1137a). Following this, the railroad, on July 14, 1961, declared S.T.G. in default (1060). It thereafter had the work completed by the firm of Spencer, White & Prentis pursuant to the redesign which eliminated the rock penetration requirement (197a-200a, 204a-206a, Exhibits 22A and 31).

In June of 1961, soon after it terminated the contract, S.T.G. brought suit in the New York State Supreme Court to recover its damages. However, the action proved jurisdictionally defective, and by stipulation it was agreed that S.T.G. would terminate that action and would assert a similar counterclaim in this action, which, in the interim, the railroad had instituted.

The Specification Requirements

The contract plans and specifications set forth precisely the number, design, dimensions and locations of the fender cells, and the thickness, modulus, shape and type of interlocking devices of the steel sheet piles forming the periphery of the cells (Exhibit 1, sheet 3 (997a) and sheet 4). The tip elevations of the sheet piles, how they are to be driven and the nature and sequence of operations for rock excavation and penetration are set forth in step by step detail in the specifications. These, we submit, constitute detailed specifications, as hereinafter defined.

Section IV of the specifications, entitled "CONSTRUCTION OF FENDER SYSTEM FOR PIER No. 1" (1032a), provides under subdivision. Article 4 thereof, entitled "PLACING & DRIVING SHEET AND Z-PILING" that the contractor shall drive the sheet piles to the top elevations indicated on the drawings; that the new sheet piling would be attached to "previously driven sheet piles of Pier No. 1 Cofferdam", and that where necessary to excavate and remove rock to reach such plan elevation, "Such excavations shall conform to the requirements of Section II" (1032a-1033a).

Article 5 of Section IV, entitled "CONSTRUCTION METHODS" provides in material part:

> "It is required that all steel sheet piling penetrate to the tip elevations shown on the plans, and that rock be removed, if necessary, to permit the sheets to penetrate to the required elevations.
>
> * * *
>
> "At Cells 'D' and 'E', and at other cells wherever it is impossible to drive the sheet piling to the required tip elevations, all material within the cells *shall* be excavated to the top of undisturbed rock. Rock *shall* then be excavated by an approved

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method to the extent necessary to permit the sheets to penetrate to the required tip elevations. This work shall preferably be done in the dry, and the Contractor shall provide, if necessary, all equipment and dewatering pumps required to accomplish this result. After the excavation is completed and cleared of all loose material, the cells *shall* be allowed to fill with water. The steel sheet piles shall then be redriven to the required tip elevations.

* * *"

Before commencing work, the Contractor shall submit for the approval of the Engineer a detailed statement, supplemented by drawings, of the methods he proposes to use for the construction of the steel sheet pilings cells." (1033a, 1034a, emphasis supplied)

The method to be submitted by S.T.G. for approval necessarily had to comply with the procedures set forth in Section IV and with those of Section II to which, ". . . such excavation shall conform." (1033a). Section II, entitled "EXCAVATION FOR STRUCTURES" establishes the criteria for ". . . the removal of solids of every nature required for the excavation within the sheet pile cells" (Art. I, 1029a). This was the section of the contract governing how rock was to be removed in order to allow penetration of sheet piles.

Article 2 of Section II provides in part:

"All material inside Cells D and E, *shall* be excavated down to the top of undisturbed rock, and rock *shall* be excavated to the extent necessary to permit driving the sheet piling to the required tip elevations as shown on the drawings, and in conformance with Section IV, Construction of Fender System for Pier No. 1.

* * *" (1029a)

Article 4 of Section II, entitled "Methods and Protection", provides with respect to rock excavation:

"• • •

> The Contractor shall submit to the Engineer for approval a plan of his proposed method of excavating rock. *Blasting shall be employed* adjacent to the new Pier No. 1, and the Contractor *shall* close line drill along the face of said Pier as required to protect the new Pier No. 1. The plan *shall* include size and spacing of line drill holes, a system of relief, *spacing of blast holes and the method of delayed blasting . . .*" (1030a—emphasis ours.)

Article 5 of Section II provides:

> "The Contractor shall provide and operate suitable drainage and pumping facilities to remove all water during excavation of Cells 'D' and 'E' and elsewhere if required for construction." (1031a)

The line drilling along the face of the pier was specified as a possible cut-off of the blasting effect. Article 4, Section II, also provided that explosive charges would be proportioned so as not to loosen material outside the established excavation lines; that a licensed professional blaster "shall be used"; that the contractor was prohibited from damaging the materials supporting the adjoining Pier No. 1; and that contract was to remain liable for such support of the adjoining structure even though the method of blasting is approved by the owner (1030a).

The specifications were deemed an "essential" part of the contract, which expressly obligated S.T.G. as the contractor, to perform the work in accordance therewith (1009a, (1)). And by its bid, S.T.G. obligated itself to perform the work ". . . in *strict accordance* with the plans, specifications and contract . . ." (1003a—emphasis ours).

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In addition, Paragraph 7 of the contract further indicated the detailed nature of the specifications by providing that:

> "• • • As the work progreses, additional plans may be furnished by the Company from time to time as may become necessary to explain more exactly any illustrate the manner in which the above mentioned plans and specifications are to be carried out and such additional plans shall be essential parts of this contract and binding on the parties hereto. • • •" (1013a)

In like vein, Paragraph 10 of the contract indicates the necessity of following specified procedures by providing that the contractor:

> ". . . shall not be liable for any damage to real property or claims therefor resulting from the carrying out of the work as provided in the plans and/or described in the specifications where such damages or the claims therefor do not result from accident or from the negligence of carelessness of the Contractor . . ." (Exhibit 2 p. c-6)

Paragraph 17 of the contract provides that contractor was to:

> "examine and compare the plans and specifications and shall report to the Engineer any errors or discrepancies found therein. . . . the Engineer shall promptly verify the same. Any work done after such discovery, until authorized by the Engineer, will be done at the Contractor's risk." (1014a)

Under Paragraph 44, the railroad was authorized:

> "to make any changes that may be hereafter determined upon in the nature or dimensions of the

> work . . . and such changes, when made shall be deemed incorporated as parts of this Contract . . ." (1016a)

It is submitted that the foregoing constitutes a detailed specification directing strict compliance with a blasting method to effect rock penetration and warranting its practicability and possibility.

The specified method required the contractor to drive the sheets to unyielding rock, then excavate the interior of the cell, then use pumps to keep the excavation free of water otherwise flowing in from the channel, so that the rock could be blasted "in the dry". In the event, the channel water could not be pumped out the blasting of the rock would have to be done under water by divers, (412a, 415a-417a, 458a, 443a-444a). The specifications inherently represented that the rock could be safely blasted using this sequence of operations, after which the trench so blasted would be cleaned of loose rock, the cell flooded and the sheet piles driven to the bottom of the trench. The cell could then be braced and filled.

The Decision Below Holding the Aforesaid Language Constituted a Result Specification

Despite the clear language of the specifications, as to the methods and procedures by which the sheets would be driven into the rock by blasting, the Circuit Court, concurred with the District Court's finding ". . . that the original contract permitted S.T.G. to use any adequate method desired to sink the cells into rock and did not actually require it to use blasting." We urge that this was fundamental error counter to the basic principle of building construction law that where procedures are specified by the owner they constitute a representation on which the contractor is entitled to rely.

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The contractor was here told what to do and how to do it. S.T.G. had only the limited choice of selecting the method of blasting under the prescribed conditions. If, as was conceded, no method of blasting could have been used under the foregoing prescribed procedures, then, under principles of law established by this Court, the railroad, not the contractor, was obligated to redesign the work.

The Use of a Double Cofferdam

The Circuit Court found that S.T.G. did not attempt to use the blasting method (1157). However, in view of the unrefuted testimony that it was dangerous and impracticable, S.T.G. was not obligated to do so. The Circuit Court itself recognized this in stating ". . . that blasting was itself feasible with a double cofferdam to protect the cells" (1156-1157). This was in line with the suggestion made by the Railroad's expert Dr. Philip Rutledge, at trial, that only by making an expensive installation of a separate row of Z-sheet piles set in the channel and encircling the area of the cells, could the contractor avoid the blows which would occur if such double cofferdam were not used. (600a, 628a, 630a, 1115a).

The simple answer is that the double cofferdam was not specified as part of the detailed procedures and methods to which the contractor had to strictly conform in building the cells. If the Railroad's architects believed a double cofferdam necessary, it should have been specified as part of the methods and procedures prescribed. Section IV, Article No. 1, states that ". . . the fender system for Pier No. 1 shall be constructed as shown on the plans . . ." (1032a). A double row of sheet piling was clearly not shown. Moreover, the specifications prohibit the contractor from doing anything to interfere with navigation in the channel, and putting the steel sheet piling into the channel, without any details for supporting it, would cer-

tainly be an interference with navigation which no contractor could have contemplated.

Neither the Railroad nor its architects contemplated use of the double cofferdam method, and never suggested it when S.T.G. concededly requested suggestions. Interestingly, although at trial this method was ostensibly offered in evidence as Dr. Rutledge's own design (599a-600a) he admitted on *voir dire* that it had actually been prepared by the Railroad's own architects-engineers, but for presentation in Court, not in connection with the contract work (602a-605a, 515a).

Furthermore, when Dr. Rutledge was consulted by S.T.G. in August 1960, he not only did not mention such a method, but actually recommended use of the "built-in caisson" method (634a, 1129a).

The feasibility of the double cofferdam design is not in issue. If this was a detailed specification as S.T.G. claims, then it was the railroad's obligation to have suggested it at the time and to have paid S.T.G. an extra to cover the additional cost. If this was a result specification, then S.T.G. would be responsible for adopting any workable method.

Certiorari Should Be Granted for the Following Reasons:

I.

Important Question of Federal Law Involved:

A.

A Contractor May Rely on the Feasibility of Detailed Specifications

The Federal Government's own major involvement in public construction work is so overwhelming as to have caused the establishment of an entire system of semi-judicial Boards of Contract Appeals for determining Government contract cases by adversary proceedings, subject to judicial review. Consequently, well-defined principles of building construction law must be established and, once established, be strictly upheld.

One of these basic tenets is that where the specifications indicate the basic methods and procedures by which the work is to be performed, the owner is held to warrant the adequacy and practicability of such specified methods to produce the result required. This is distinguished from a result specification, in which the contract clearly provides that the contractor expressly undertakes the responsibility of finding a method to achieve a stated result.

Our case involves a classic example of the detailed specifications, setting forth the methods and procedures to be strictly followed for achieving rock penetration of the sheet piles. By interpreting this as a result specification, so that the detailed procedures were meaningless, the Courts below have upset the fundamental distinction between detailed and result specifications so basic to the field of public construction law. It is submitted that this court should reaffirm the rule that a contract specifying methods and procedures cannot be found to be a result specification.

Basic Rules Differentiating Detailed And Result Specifications

Apart from the clear meaning of our specifications, the following rules applicable both in Federal Law and leading New York State Law require a determination that ours was a detailed, not a result specification.

1. Presumption that Government financed, Competitive Contracts, Required Detailed Specifications.

A construction contract required to be awarded by competitive bidding is presumed to contain detailed specifications so that bidders are bidding on the same design.

This contract, awarded under 33 U.S.C. §515, involving Federal funds and supervision, required public bidding. Unless the specifications were definite and certain in describing the work the contract would have been invalid.

Brooklyn Ash Removal Co. v. *O'Brien,* 238 App. Div. 647 (1st Dept. 1933):
Warnock v. *Wray,* 194 N.Y.S. 396 (S. Ct. 1922).

In *Hart* v. *City,* 201 N. Y. 45 (1911), Hiscock, J., stated:

> "In fact, unless the requirement of the statute for specifications as a basis for competitive bidding on an important and expensive municipal enterprise like this is satisfied by a mere summary of the general results to be accomplished as evidenced by a testing period, the specifications in question were not sufficient. It seems clear that such purported specifications cannot possibly furnish the basis for real competitive bids which may be subjected to an intelligent and uniform test for the purpose of determining which is the lowest, and therefore, within the terms of the statute." 201 N. Y. 45, 53.

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In *Peter Kiewit & Sons* v. *U. S.*, 109 Ct. Cls. 390 (1947), it was held that specifications for a competitive bid contract be crystal clear to avoid turning a useful government project into a gambling transaction. In our case, the specifications do clearly set forth the methods and procedures to be used in driving the sheet piles into rock.

2. Result Specifications Involve Novel and Developmental Contracts.

Inasmuch as competitive bidding requires detailed specifications, a "result" specification is generally restricted to novel, unusually complex or unique situations where the problem, such as formulation of a computer system, is particularly within the special knowledge of the contractor, and such problem is indicated and the contractor specifically advised he must solve it.

Harvey Wells Electronics Inc., 59-1 BCA 9536 Par. 2185;
Manufacturers Research Corp., ASBCA 838 (1951);
Seaview Electric Co., 61-2 BCA 16363 Par. 3151;
U. S. v. *Wegmatic Corp.*, 360 F. 2d 674 (2nd Cir. 1966);
Robins Mills, Inc., ASBCA 2255;
L. & O. Research and Development Corp., ASB CA 5013, 1 GC Par. 215;
Spencer Explosives, Inc., ASBCA 4800, 2 GC Par. 526.

In a construction contract, the special knowledge is not that of the contract, but of the owner's architects-engineers, here Parsons, Brinckerhoff, Hall & MacDonald, who designed the plans and specifications.

3. A Result Specification Must Clearly Express Such Intent.

Consequently, if a "result" specification is intended such intention must be clearly stated.

Cassoff v. *State of New York*, 44 N.Y.S. 2d 514 (Ct. Cls., 1943).

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In *Sweezy* v. *O'Rourke*, 226 N. Y. 378 (1919), the Court stated:

> "a person who contracts with another to do work is entitled to the prescribed compensation therefor. If the compensation is wholly dependent upon the accomplishment of a particular result the person for whom the work is done should express such unusual provision in terms so clear as not to be misunderstood." 226 N. Y. 378, 382.

See also,

> *Gillet* v. *Bank of America*, 160 N. Y. 549;
> *Atterbury* v. *Bank of Washington Heights of the City of New York*, 241 N. Y. 231;
> *Maxwell Electrical Corp.*, 1963, B.C.A. 19419, Par. 3916.

No such intention was stated in our contract despite the fact that the railroad had necessarily abandoned a similar contract requirement for rock penetration under the prior Pier No. 1 contract.

In *J. L. Simmons Co., Inc.*, 67-1 B.C.A. 29,417, Par. 3655, the Board specifically pointed out that the government, on a later contract in the same area, warned bidders of the problem and specifically made them responsible to use construction methods to accomplish the ultimate, stated results.

4. Detailed Specifications May Encompass a Subsidiary Design Obligation.

The fourth rule of construction is that the mere fact that the contractor is given the right to employ his own method of procedure within the limitations of the detailed specifications does not make it a result specification with

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respect to a problem arising out of those detailed specifications.

Thus in *R. M. Hollingshead Corp.* v. *U. S.*, 111 F. Supp. 285 124 Ct. Cl. 681 (1953), a contractor, although required to supply a solvent which would not become cloudy, was relieved of responsibility where it was the specified metal drum which caused the solvent to become cloudy.

Similarly in *Hol-Gar Mfg. Corp.* v. *United States,* 360 F. 2nd 634, 175 Ct. Cls. 518 (1966), the contractor was relieved of responsibility, although required to supply design data and to accomplish a stated performance, where the basic design specified by the government was deficient.

And in *J. L. Simmons Co., Inc.,* 67-1 B.C.A. 29417, Par. 3655, the specifications which prescribed the character, dimension and location of the pile work, also provided that the contractor should use the driving and method of forming which would be such as to produce piles capable of sustaining specified test loads. This, the government argued, made it a result specification whereby the contractor agreed to become responsible for the ultimate design objective. The Board held otherwise, stating that the consequent uncertainty as to the amount of driving that might be necessary to achieve the specified bearing capacity did not change the basic nature of the specification from a detailed to a result specification.

It is most noteworthy that in the *Simmons* case, Dr. Philip Rutledge, the railroad's chief witness in our case, was there the chief witness for the Contractor, inconsistently arguing that the specifications therein were detailed not result specifications, despite the contractor's agreed risk of achieving a specified bearing capacity, since such could not be achieved under the owner's specified pile design.

Similarly, in our case, the fact that the contractor was to submit a method of rock excavation within the specified limitation that "blasting shall be employed * * *" after the piles were driven into the rock and the interior of the cells excavated to rock, does not make this a result specification exculpating the owner, where the prescribed blasting was improper and dangerous, and, indeed, the entire requirement for rock penetration was impracticable, and eventually abandoned.

Definition Of Detailed Specifications

A detailed specification is defined as follows in *J. D. Hedin Construction Co.* v. *U. S.*, 347 F. 2d 235, 171 Ct. Cls. 70 (1965):

> "It is well settled that where the government orders a structure to be built, and in so doing prepares the project's specifications prescribing the character, dimension, and location of the construction work, the government implicity warrants, nothing else appearing, that if the specifications are complied with, satisfactory performances will result. E.g., *United States* v. *Spearin*, 248 U. S. 132 (1918); *Laburnum Construction Corp.* v. *United States*, 163 Ct. Cls. 339, 325 F. 2d 451 (1963); *Arcole Midwest Corp* v. *United States*, 125 Ct. Cl. 818 (1953); *Stapleton Construction Co.* v. *United States*, 92 Ct. Cl. 551 (1940). This rule rests on the presumed expertise of the government where it sees fit to prescribe detailed specifications. *National Presto Industries, Inc.* v. *United States*, 167 Ct. Cls. 749, 758 footnote 6, 338 F. 2nd 99, 105 (1964), *cert. denied* 380 U. S. 962 (1965). 'This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up on plans, and to assume responsibility for the work until completion and acceptance.' *United States* v. *Spearin*, supra at 137 (Court footnotes omitted).

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> • • • If faulty specifications prevent or delay completion of the contract, the contractor is entitled to recover delay damages for defendant's breach of its implied warranty, and this breach cannot be cured by the simple expedient of extending the time of performance. *Litchfield Mfg. Corp.* v. *United States,* supra at p.610, 338 F. 2d at 95 • • •"
>
> "• • • The difficulties encountered do not stem from unknown subsurface conditions, but were directly attributable to defendant's failure to properly evaluate the known subsurface conditions in designing the specifications for the piles. Here the government chose to exercise its presumed expertise and thus impliedly warranted that satisfactory performance would result. As we said before, the thin-shelled piles originally selected for this project proved to be unsatisfactory since they could not be driven properly. This constitutes an error in the specifications which establishes a predicate for a breach of the government's implied warranty. *Morrison-Knudsen Co.* v. *United States,* 170 Ct. Cls. 712, 345 F. 2d 833 (1965)." 347 F. 2d 235, p. 244.

Definition Of Result Specification

In *J. L. Simmons Co., supra,* an "end result" specification is defined as one in which contractor has

> "contracted to produce the ultimate design objective by application of its own skills and by construction methods of its own choice" and thereby "assumed the risk of achieving the end result and must bear the consequences of any difficulties encountered in doing so." (p. 29419)

An Owner Is Held To Represent That Methods Set Forth To Be Followed Are Practicable

S.T.G. could rely on the inherent representations of the owner both that the penetration of the sheet piles into rock was practicable of accomplishment, and that it could be practically achieved by the prescribed method utilizing blasting. If such procedures were impracticable or impossible it would constitute a breach of contract permitting the contractor to recover its damages incurred thereby. In *Young Fehlhaber Pile Co.* v. *State of New York*, 265 App. Div. 61, the court stated at page 63:

> "The State should not be thus permitted by general provisions in its specifications, instructions or contract from escaping liability for its direct and patent misrepresentations. The bidder could properly rely upon the clear and unequivocal information contained in the plans, otherwise they would serve no useful purpose. They should reasonably depict the work to be done and where they are definite and plain the contractor is entitled to rely upon them . . . ."

In 6 ALR 3rd at page 1397 it is stated:

> "The rule has become well settled in practically every American jurisdiction in which the matter has been involved, that a construction contractor who has followed plans or specifications furnished by the contractee, his architect or engineer, and which have proved to be defective or insufficient, will not be responsible to the contractee for loss or damage which results, at least after the work is completed, solely from the defective or insufficient plans or specifications, in the absence of any negligence on the contractor's part, or any express warranty by him as to their being sufficient or free from defects."

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See also:

U. S. v. *Spearin*, 248 U. S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918);
Kansas Turnpike Authority v. *Abramson*, 275 F. 2d 711, 713, 715 (10th Cir. 1960);
Laburnum Construction Corp. v. *United States*, 325 F. 2d 451, 163 Ct. Cls. 339 (1963);
6 WILLISTON CONTRACTS P. 5515 § 1966 (1938 Rev. Ed.);
Wunderlich Contracting Company v. *United States*, 351 F. 2d 956 (1965);
Helene Curtis Industries, Inc. v. *United States*, 312 F. 2d 774, 160 Ct. Cls. 437 (1963).

Even if the railroad argues, as it did below, that the blasting procedures was only an alternative, suggested method (an interpretation contrary to the plain meaning of the wording, since no other alternative was specified), it would still be held to have warranted the practicability of such an alternatively specified method, and S.T.G. had a right to rely upon the fact that construction could be accomplished by such a method.

Green v. *City of New York*, 283 App. Div. 485 (1st Dept. 1954).

The contract obligated the contractor to perform in strict conformity with such details. A contract ". . . cannot impose an obligation which cannot reasonably be performed."

(*J. D. Hedin Construction Co.* v. *U. S.*, *supra*, at page 244)

And in *Turnbull, Inc.* v. *United States*, 389 F. 2d 1007, 180 Ct. Cls. (1967), where the specifications called for the walls and roofs to be installed before the concrete floors,

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the Contractor was held entitled to additional money on being directed to perform in a different sequence than specified.

S.T.G.'s Rights As A Result Of The Defective Design

Upon ascertaining that the specified methods and procedures for rock penetration were dangerous and impracticable, S.T.G. was entitled to stop all work until the railroad and their engineers produced a new design. Otherwise, it would be "impracticable to build within the limits of the remainder of the contract . . . Under this condition of things . . . the contract is regarded as an end . . ."

Kinser Construction Co. v. *State of New York* (1912), 125 N.Y.S. 46, 49, 54, aff'd 145 App. Div. 41, aff'd 204 N. Y. 381;
Hol-Gar Manufacturing Corp. v. *United States, supra,* at p. 639.

See also:

Whipple v. *Lyons Beet Sugar Refining Co.,* 64 Misc. 363, aff'd 137 App. Div. 881, aff'd 202 N. Y. 522;
National Contracting Co. v. *Hudson River Water Power Co.,* 192 N. Y. 209;
P. L. Saddler v. *U. S.,* 152 Ct. Cls. 557;
Bintz v. *Mid-City Park Corp.,* 223 App. Div. 533;
Empire Foundation Corp. v. *Town of Greece,* 31 N.Y.S. 2d 424;
Aragona Construction Co. v. *U. S.,* 165 Ct. Cl. 382;
W. O. Dillon v. *U. S.,* 156 F. Supp. 719;
Mitchell Canneries, Inc. v. *U. S.,* 111 Ct. Cls. 228, 250;
Fisher v. *U. S.,* F & G 39 N. E. 2nd 67 (Ill.);
Restatement of Contracts § 454 pp. 843, 844; § 456, Illust. 4, p. 849:

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Williston on Contracts, Rev. Ed. 1938, Vol. 6 § 1931, p. 5410;
J. L. Simmons Co., Inc., 67-1 BCA 29417.

The specified blasting method having proved practicably impossible, it was the railroad's responsibility to change the design, not the contractors, both under paragraphs 17 and 44 of the contract (1014a, 1016a), and by operation of law. As stated in *J. L. Simmons Co., supra*:

> "Any responsibility for special measures to cope with the possible effects of the existing open excavation rested with the Government, in our opinion, as part of the design responsibility it had assumed." (p. 29425)

Totally irrelevant to this determination, as well as inaccurate, was the Circuit Court's statement that S.T.G. was "attempting to perform a contract which was too demanding for its resources." (1156). The only issue here, on which certiorari is sought, is whether the Railroad is to be held responsible for the admittedly faulty specified procedures for constructing the cells by sinking the sheet piles into rock. If so, the breach is the Railroad's, not S.T.G.'s.

The District Court's determination that S.T.G. was inept is all the more irrelevant in that it was made only at the end of plaintiff's case, the Court then going out on a limb to state:

> "There is no impossibility here, the proof cries out for the proposition that what happened was that S.T.G. was inept. They couldn't do the work. They signed the contract that they couldn't hope to fulfill on the strength of their capabilities." (358a)

This statement was made before S.T.G.'s presentation as the impracticability of the design, and also before

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any expert, even the Railroad's own experts, had testified on either side of such fundamental issue.

Other statements made by the District Court, concurred in by the Circuit Court, put the issue in clear focus. Thus, the District Court stated, again before presentation of S.T.G.'s case, that the contract required

> ". . . that you submit any sensible plan for getting sheeting down to the desired tip levels, . . ."
>
> ". . . You had your chance and muffed it—it is just as simple as that . . .
>
> You simply contemplated blasting, and now to come into Court here and say that blasting is dangerous is almost laughable." (355a-356a)

It is sufficient that it was the railroad that contemplated and prescribed blasting by plans drawn up by a reputable architect, and the contractor had the right to rely on them in bidding the job, but was not required to proceed with them once it had found out that they were deficient. At that point the burden shifted to the Railroad to redesign the work. A contractor ". . . cannot be charged with foresight greater than the design engineers themselves", *J. L. Simmons, supra,* p. 29, 427).

> "The judgment and skill of the contractor is relied upon by the defendants to the extent only of executing the plans as they design them." (*Spearin* v. *U. S.,* 51 Ct. of Cls. 155)

Rather than stop work, S.T.G. attempted to cooperate by suggesting and attempting the method of drilling 4 inch holes through 35 feet of overburden and into the rock. They did this after the railroad had requested, approved and adopted such plan; thus the railroad had made the substitute plan its own, and became responsible therefor. (*In re: Tankersley Construction Corp.,* 57-1 B.C.A. 3892, ¶1278).

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To hold a contractor responsible for any suggestions at the request of the owner when the specification design proves impracticable, would effectively prohibit any co-operation by contractors in overcoming design problems, causing much unnecessary litigation.

A contractor is even entitled to the additional cost of trying to achieve the desired result where the specified procedures are defective. In *Hol-Gar Manufacturing Corp., supra,* at page 638 the contractor was granted recovery for trying for 3 years to attain desired performance where, as in our case, the desired performance could only be attained after the specifications were changed. The owner is held to be under a duty not to render the work more expensive that it would be if the contractor could comply with the government's specifications *Laburnum Construction Corp.* v. *United States, supra.*

The Circuit Court's statement that the cells had sustained a loss in structural strength because S.T.G. had installed some sheet piles backwards is contrary to the record (1155). Concededly, two (2) piles, each only 18 inches wide, were installed backwards but no loss of structural strength resulted, and the Railroad determined they would not have to be removed. Even after termination, the Railroad in analyzing the condition of the job found no defective sheet piling (158a-162a).

Nor did the Railroad contract with the completing contractor to remove any damage sheet piling installed by S.T.G., as stated by the Circuit Court (1155). Spencer, White & Prentis, the completing contractor, was, concededly, only hired to finish the work by its built-in-caisson method, not to replace any damaged piles. During its operations, its underwater divers found four (4) sheets torn at interlock and these were repaired as an extra to the contract. The only explanation for those

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tears was that the existing steel sheets of the Pier No. 1 cofferdam, to which S.T.G. had to attach its own sheet piles (1032a, 30a, 82a, 83a, 997a), were out-of-plumb in two directions, and S.T.G. so notified the railroad at the start of its fender cell work (1126a-1128a). The cofferdam sheets being 15 inches further out at the bottom than at the top, great lateral stress occurred at the bottom of the last interlock of the sheet piles in the cell, tending to force it open. The out-of-plumb condition was not refuted, and was the only explanation made at the trial for the torn interlocks (549a-553a, 458a-459a).

B.

Even If Ambiguous, The Owner's Specifications Must Be Interpreted As Detailed Specifications, To Favor The Contractor's Reasonable Interpretation.

A further important question of Federal Law is raised by the Circuit Court's statement that, despite the detailed blasting procedures specified ". . . There is also evidence to indicate that the contract need not be read as requiring such a method" (1157), and that the specifications can be interpreted to mean ". . . only that the sheet steel be driven to required elevations." (1157 fn. 3)

The specifications were written by the Railroad, and, even if ambiguous, cannot be so flagrantly interpreted in the Railroad's favor, without violating that fundamental rule of both Federal and New York State Law that an ambiguous contract provision must be interpreted against the one who drew it and in favor of any reasonable interpretation placed upon it by the party who did not draw it.

Ring Construction Corp. v. *United States,* 162 F. Supp. 190, at 191, 142 Ct. Cl. 731 (1958);

Bennett v. *United States*, 371 F. 2d 859, 178 Ct. Cl. 61 (1967);
Hol-Gar Mfg. Corp. v. *United States supra*, at page 639;
Peter Kiewit Sons Co. v. *United States*, 109 Ct. Cl. 390 (1947);
Evelyn Bldg. Corp. v. *City of New York*, 257 N. Y. 501 (1931);
Rentaways Inc. v. *O'Neil Milk & Cream*, 308 N. Y. 342, 348.

Moreover, it is undisputed that at conferences held throughout the performance of work, Mr. Fico, the Railroad's engineer and witness, insisted that the prescribed and condemned blasting operations were mandatory procedures under the specifications (91a, 387a, 388a, 561a). A further cardinal rule of interpretation is that there is no surer way to determine the meaning of a contract provision than to see how the parties have interpreted or have acted under it.

Clark v. *Carolina & Yakin River Ry.*, 225 N. Y. 589, 122 N. E. 452;
Brooklyn Public Library v. *New York*, 250 N. Y. 495, 166 N. E. 179.

Thus, in bidding the contract, S.T.G. was entitled to rely on its reasonable interpretation that the intent of the contract was that the work must and could be done by blasting in accordance with the procedure and methods set forth, without any necessity for the use of any other method of construction, including the expensive and unspecified use of a double cofferdam.

II.

Conflict of Decisions

A. The decision below is in conflict with the decision of this Court.

This Court held, in *United States* v. *Spearin, supra,* that an owner who specifies how work is to be done warrants that a bidder can rely upon the fact that the specified procedures are workable.

This Court also denied certiorari, in 380 U.S. 962 (1965), in *National Presto Industries, Inc.* v. *United States,* 167 Ct. Cls. 479, 758, footnote 6, 338 F. 2d 99, 104 (1964), which held that where the owner sees fit to prescribe detailed specifications, one can rely on its presumed expertise.

The rule that an owner who exercises its presumed expertise impliedly warrants that satisfactory performance would result cannot be subverted by simply denying that clearly detailed methods and procedures for performing work constitute a detailed specification warranting the practicability of such methods. Where the procedure is specified, the contractor may rely on the inherent representation that it will work.

B. There is a conflict in the decision of the Court of Appeals for the Second Circuit in our case and cases determined on public construction law by the Court of Claims.

The decisions in *J. D. Hedin Construction Co.* v. *U. S., supra, Hol-Gar Mfg. Corp.* v. *United States, supra, Kansas Turnpike Authority* v. *Abramson, supra* and *Laburnum Construction Corp.* v. *United States,* 163 Ct. Cl. 339, 325 F. 2d 451 (1963), adhere to *United States* v. *Spearin, supra,*

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holding an owner responsible for its specifications. In these cases, as in *J. L. Simmons, supra,* a contractor was not held responsible to achieve stated results where such achievement was rendered impossible by the government's own specifications for the work.

Our case is similar since no plan for blasting would have been feasible within the procedures specified for sinking the sheets into bedrock.

Furthermore, where the specification clearly states the sequence of operations to be followed: drive sheet piles to bedrock, excavate within the cells, pump if possible, blast rock by an approved method, etc., the contractor is perfectly justified in believing that his obligation to submit such approved method falls within his specified obligation to strictly conform to the foregoing detailed procedures, and that the contract must be so interpreted, and cannot be interpreted, to the railroad's favor, to mean that the contractor thereby obligated itself to achieve rock penatration by any means possible, even if the detailed method proves deficient.

> *Ring Construction* v. *United States, supra;*
> *Bennett* v. *United States, supra.*

C. There is also a conflict between the decisions below and leading case law in the State of New York.

The New York Court of Appeals has held that a result specification should be expressed in the clearest language (*Sweezy* v. *O'Rourke,* 227 N.Y. 378, 382 (1919)) particularly since there cannot be proper competitive bids on government financed contracts without a uniform detailed specification on which to base the bids (*Hart* v. *City,* 201 N.Y. 45, 53 (1911)).

Once a contract specification proves unworkable, a contractor has no further obligation until the owner redesigns

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it. *Kinser Construction Co.* v. *State of New York* (1912), 125 N.Y.S. 46, 49, 54, aff'd 145 App. Div. 41, aff'd 204 N.Y. 381.

Even if the detailed method is only an alternatively suggested procedure, the contractor may still rely on its presumed expertise. *Green* v. *City of New York*, 283 App. Div. 485 (1st Dep't 1954).

A contractor should not be asked to bid on detailed specifications prepared by the owner's architect and run the risk of having to redesign the work if such specifications should prove impracticable of performance. Yet that is just what the decisions below required S.T.G. to do.

CONCLUSION

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted,

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On the Petition and Brief

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 214, 215, 216—September Term, 1969.

(Argued November 6, 1969 Decided January 26, 1970).

Docket Nos. 33077, 33113, 33188

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Plaintiff-Appellee-Appellant,

—v.—

S.T.G. CONSTRUCTION CO., INC., and CONTINENTAL CASUALTY COMPANY,

Defendants-Appellants-Appellees.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Diversity action by New York railway company against New Jersey construction company and its surety for damages resulting from breach of contract to erect fender system to protect a new railway bridge. The construction company counterclaimed for recovery *in quantum meruit* for work which it had completed before the breach. The

United States District Court for the Southern District of New York, Tyler, *J.*, held the railway was entitled to the additional costs it incurred in completing the contract after the construction company's breach but was not entitled to liquidated damages for the delay caused by the breach. The construction company's claim for recovery *in quantum meruit* was denied. Both parties appealed.

Affirmed.

Donald M. Dunn, Donald B. Ferens, Alexander & Green, New York City, for Plaintiff-Appellee-Appellant.

Max E. Greenberg, Louis Cantor, New York City for S.T.G. Construction Co.

Donald B. Knight, New York City, for Continental Casualty Company.

WATERMAN, *Circuit Judge*:

S. T. G. Construction Company, the defendant below, together with its surety Continental Casualty Company, failed to complete a contract it had entered into with the plaintiff, Staten Island Rapid Transit Railway Company, to build a fender system for a new bridge being constructed by the Railroad over the Arthur Kill from Staten Island to Port Elizabeth, N. J. The Railroad commenced a diversity of citizenship action in the United States District Court for the Southern District of New York[1] by

[1] The finding of facts by the lower court raised doubts about the existence of diversity by stating that S. T. G. Construction Company, the defendant, had its principal place of business in New York. The plaintiff, Staten Island Rapid Transit Railway Co., was also a New York corporation. However, all attorneys in this case have stipulated that the lower court factually erred, and that S. T. G.'s principal place of business at all times relevant to this suit was in New Jersey rather than in New York, although the company did maintain a New York office for purposes of this contract.

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which it sought to recover in damages the additional sums it had to pay for the contractor who completed the work above and beyond the S. T. G. contract price, and also sought to recover liquidated damages for the delay in completion. S. T. G. in turn counterclaimed *in quantum meruit* for the work done before it abandoned the work, alleging that the Railroad and not S. T. G. had breached the contract by furnishing defective construction plans and specifications. The trial court entered judgment for the Railroad on the issue of breach, awarding it the additional costs of completion it proved, but denied its claim for liquidated damages. S. T. G.'s counterclaim was also denied. Both parties appeal. We affirm the judgment below.

The construction of the new bridge involved three separate contracts, of which this suit involves the third. Each contract was financed by the Railroad with federal aid under the Truman-Hobbs Act, 33 U.S.C. §§511 et seq. Contract Number One provided for the construction of piers Number One and Two and the bridge approaches. Contract Number Two provided for erection of the superstructure of the new bridge and removal of the existing swing-span of the old bridge. Contract Number Three, which gave rise to this litigation, involved the demolition of the old bridge's center pier and abutments and of a wooden trestle; and the construction of a fender system for the new bridge's Pier Number One, on the Staten Island side of the Arthur Kill.

Contract Number Three was advertised for bids subject to the approval of the Army Corps of Engineers. Prospective bidders were furnished plans and specifications, core borings indicating subsurface conditions, and engineering drawings of the foundations of the pier which the fender system was to protect. S. T. G. submitted the lowest bid

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for Contract Number Three, at $833,140—a price $56,000 less than the next lowest bid—and was awarded the contract which was entered into on January 18, 1960.

Construction of the fender system involved the erection of eight interconnected circular cells, five on the north side and three on the south side of Pier Number One. These cells were to serve as a fender to protect the pier from being struck by ships or floating objects and were to be completed by September 28, 1960. The fender cells were to be constructed of sheet steel which would be filled with loose stone and sunk into the bed of the Kill. Four of the cells were to be driven to an elevation of 45 feet below the bed which would seat them 10 feet into solid bedrock. The contract anticipated that this seating would be accomplished by first sinking the cells as far as the bedrock, then draining them of water, and finally securing them in the rock by blasting out a trench into which the cells of sheet steel were to be placed.

S. T. G. satisfactory and promptly completed the demolition work called for by Contract Number Three. However, after entering on the fender construction work, S. T. G. soon became convinced that the blasting method was unsafe because blasting might "blow" the cells, thereby allowing water to rush into them, and because a blasting purposed to seat one cell might dislodge rock and earth which would strike and dislodge the other cells from position. On February 26, 1960, soon after entry upon the contract, S. T. G. submitted a substitute plan which the Railroad approved. Under this plan, the construction company before sinking the cells to bedrock would drill a circle of holes in the rock where the cells were to be sunk, then would break down the rock between these holes with a spud to form a circular trench. These operations

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would be conducted "in the wet," that is, under water, before the cells were sunk to the level of the bedrock.

Very little was ever accomplished by S. T. G. under this plan. A well driller attempted in April, 1960, to drill the required holes but quickly decided that he was unable to do so. In July and August S. T. G. also attempted use of an auger drill, a churn drill, and a tractor drill, but these attemps also failed. The chief impediment was S. T. G.'s inability to keep the holes in the required alignment. At one point, in trying to break the web of rock between two holes which had been drilled, S. T. G. attempted to pound the sheet metal of a cell down into the rock with pile drivers, but this tactic only succeeded in buckling the steel. Moreover, some of the sheet metal parts of a cell were installed backwards. This prevented them from interlocking correctly and caused a loss of structural strength. Eventually, S. T. G. admitted its inability to complete the contract by the drilling method that it had, itself, suggested.

Although the contract should have been completed by September 28, 1960, S. T. G. negotiated to continue and complete the contract at no additional cost to the Railroad. In January 1961 S. T. G. suggested yet another method of construction, the so-called "drilled-in-caisson" method. On February 16, 1961, the Railroad notified S. T. G. that it would accept this modification and offered to extend the completion date, but insisted that S. T. G. pay liquidated damages for the delay as had been provided in the original contract. S. T. G. rejected this condition, though it still offered to continue work. In June, 1961, the Railroad finally told S. T. G. to commence work within ten days or it would secure another contractor to finish the job. S. T. G. did not comply, and the Railroad finally contracted with another construction company to remove the

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damaged sheet pilings installed by S. T. G. and to finish the work at an additional cost of $100,843.50 over the original price of the contract with S. T. G. Of this sum $50,538 represented the cost of remedying the pilings already driven by S. T. G. which were damaged and out of interlock. The completed work was finally accepted by the Railroad and the Army Engineers on July 5, 1962.

On the basis of these facts, the trial court found that the original contract permitted S. T. G. to use any adequate method it desired to sink the cells into the rock and did not actually require it to use blasting. Consequently the court rejected S. T. G.'s argument that the Railroad had furnished it with defective plans requiring the use of unfeasible construction methods. Moreover, the court found that blasting was itself feasible with the use of a double cofferdam to protect the cells. The court also found that two other methods could have been used by S. T. G. to sink the pilings into the rock; the so-called "glory-hole method" and the pre-drilling method which had been unsuccessfully attempted by S. T. G. The court therefore concluded that the plans furnished by the Railroad were not defective and that S. T. G. had attempted to perform a contract which was too demanding for its resources. Moreover, the court rejected S. T. G.'s argument that the Railroad's letter of February 16, 1961 waived the original contract completion date and that later, subsequent to this waiver, the Railroad attempted to modify this new agreement by reinstating the liquidated damages provision of the January 18, 1960 contract. The court found instead that no agreement at all was reached in February, 1961, so that, throughout, the original contract of January, 1960 remained in force and S. T. G. remained liable under it.

We find the district court's view of the case convincing. It is true that the contract apparently contemplated the

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use of blasting to sink the pilings,[2] but there is also evidence to indicate that the contract need not be read as requiring such a method.[3] Yet, even if the contract had required blasting "in the dry," the court found that, as a matter of fact, S. T. G. could have done so safely with the use of a double cofferdam, but also found that S. T. G. did not even attempt to so utilize blasting. This finding is supported adequately by the testimony of the plaintiff's expert witness.[4] Finally, even if blasting had not been practical, S. T. G. itself submitted and had approved as a modification of the contract, a drilling method which the court again found to be workable but which S. T. G. failed to carry out. For all these reasons we reject the argument that the Railroad breached the contract by supplying defective plans, and we hold that S. T. G. breached the contract by failing to perform it according to those plans.

We also agree with the district court that no new contract was formed in February, 1961, when the Railroad offered to extend the completion date of the contract but also insisted on payment of liquidated damages. The continuation of the provision providing for liquidated damages appears to have been an integral part of the Railroad's offer to modify the contract, and when S. T. G. re-

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[2] Section II, Article 4 of the contract provided that "[b]lasting shall be employed adjacent to the new Pier No. 1," and that the contractor's plan "shall include . . . spacing of blast holes and the method of delayed blasting . . . ."

[3] Section IV, Article 5, entitled "Construction Methods," provided only that rock shall be excavated "by an approved method" and that the work "shall preferably be done in the dry," requiring otherwise only that the sheet steel be driven to required elevations.

[4] Direct testimony of Dr. Philip C. Rutledge.

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jected the condition it rejected the Railroad's extension-of-time offer as well.

S. T. G. also alleges that, even if it did breach the contract, the Railroad should not be permitted the recovery it seeks because the United States Government paid for 5/6 of the additional costs of completion beyond the original contract price, and the Railroad utlimately paid less as a result of S. T. G.'s breach than it would have paid had S. T. G. completed the contract.[5] We find this argument unpersuasive inasmuch as the Railroad must account to the Government for any recovery it obtains here. The Government's payment to the Railroad of additional costs the Railroad incurred in this case is authorized by 33 U.S.C. §517. Unless the Railroad suffers costs, it seems clear that no governmental payment to it would be authorized. If the Railroad recovers from S. T. G. or its surety in this suit, it will have suffered no excess costs, and its retention of government funds aimed at defraying excess costs would be illegal.[6]

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[5] S. T. G. asserts that the Government paid $715,495.00 to the Railroad upon an estimate of the value of the work done by S. T. G., although the Railroad had paid only $643,945.50. This disparity, S. T. G. claims, resulted in overcompensation of $59,028.34 by the Government to the Railroad, a larger sum than the Railroad's one sixth share of the additional costs generated by S. T. G.'s breach. Had S. T. G. completed its contract, the disparity between the Railroad's actual payments and the Government's estimate would not have had any significance.

[6] Moreover, it does not appear that the Government needed to be joined as a real party in interest under Rule 17(a) Fed. R. Civ. P. or as a person required to be joined under Rule 19.

(*Footnote continued on following page*)

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We now turn to the Railroad's cross-appeal from the lower court's denial of the Railroad's claim for liquidated damages, which the contract had specified in the amount of $250 per day, or a total of $161,250 for the 645 day delay involved here. The lower court awarded a total of $36,416.04 as actual damages arising from the delay, a sum which compensated the extra time and expense of the Railroad's employees ($12,624.00) and its engineers ($13,182.00), and of the personnel and overhead charges of the Army Engineers ($10,610.04). The Railroad asserts that it reasonably foresaw sufficiently substantial but indefinite damages at the time the contract was entered into and therefore seeks to enforce the liquidated

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(*Footnote continued from preceding page*)

Rule 17(a) provides that suit may be brought solely in his own name by a party "in whose name a contract has been made for the benefit of another." 33 U.S.C. §§516, 517 make clear that alterations to bridges pursuant to the Truman-Hobbs Act are designed to benefit the public as well as the bridge owner, and that the Government's financial share in construction evidences such benefit. Consequently we believe that the Railroad is a party comprehended within the language quoted above.

As to Rule 19, we note that the Government was not greatly biased by nonjoinder, for it could have intervened had it so desired in order to protect its interest. See Fed. R. Civ. P. 24; Fed. R. Civ. P. 19, Advisory Comm. Note, 39 F.R.D. 92 (1966); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*. 81 Harv. L. Rev. 356, 365-366 (1967). The defendants in view of the outcome in this case will almost certainly not be subject to future litigation commenced by the Government arising from the S. T. G. default upon this contract. Complete relief is granted as between these parties in the absence of the Government. Finally, S. T. G. did not raise the Government's nonjoinder as a reason for dismissal of the suit below and suggests it in this court only by inference.

damages provision instead of accepting only the actual damages award made by the lower court. These additional damages, the Railroad asserts, consists of interference to navigation, wasted time of its engineers and other personnel beyond the amount recognized by the lower court, calculations of insurance premiums, and intangible delay in the dredging of the channel.

The court below found that the Railroad had not shown that it could have reasonably expected the delay in the completion to prevent it from using the bridge, and that it had not adequately shown the nature of the additional damages it claimed. As a result the court found the liquidated damages provision to be unrelated in amount to any possibly foreseeable real damages and hence to be a penalty provision, not allowable under New York law. We agree. The standard applicable under New York law in upholding or rejecting a liquidated damages provision in a contract is whether the provision constitutes a reasonable attempt to estimate damages which, though real, may be uncertain in amount. See, e.g., *Realworth Properties, Inc.* v. *Bachler*, 33 Misc. 2d 39, 223 N.Y.S. 2d 910 (Sup. Ct. 1962), and cases cited therein at 917. In this case the Railroad has not shown that any real damages possibly and reasonably could have been foreseen that would solely result from a delay in the contract's completion, for it has not alleged with sufficient particularity the way in which it was injured by delay, Thus, the reality of its expected additional damages and not merely their amount is cast into doubt. It is unclear from the Railroad's brief whether it or the Government was affected by any substantial delay in the dredging of the channel or affected by any significant interference with navigation. The time of engineers and other personnel is mentioned only generally, and there is no showing to a greater extent than

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the lower court recognized that these persons were sitting by, idle but paid, because of the construction delay, during the period of the delay. Nor does the Railroad make any attempt to demonstrate the nature of its claimed increases in insurance premiums because of some unclear extension of liability which it was presumably required to insure for. The Railroad also fails to show that its use of the new bridge was delayed because of the late completion of the fender system.

The Railroad appears to argue that a failure on the part of S. T. G. to complete certain portions of its Contract Number Three which are not directly involved here —portions requiring the demolition of the center pier of the old bridge being replaced, of the old abutments, and of a wooden trestle—would in fact have delayed its use of the new bridge, and therefore that the liquidated damages provisions of the contract were reasonable provisions to have been inserted at the time the contract was entered into. However, we do not think that the dating of reasonableness from the formation of the contract, *Frick Co.* v. *Rubel Corp.*, 62 F. 2d 765, 768 (2 Cir. 1933), covers the situation at bar, where even at the time of the contract's formation it would not have been reasonable to expect that damages of $250 per day could possibly be suffered from a failure to complete the fender system, a portion of the contract which, if not timely performed, would not vitiate timely performance of more necessitous provisions in this and the other two contracts.

We affirm.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of January one thousand nine hundred and seventy.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Plaintiff-Appellee-Appellant,

v.

S.T.G. CONSTRUCTION CO., INC., and CONTINENTAL CASUALTY COMPANY,

Defendants-Appellants-Appellees.

(and two other cases)

Appeal from the United States District Court for the Southern District of New York.

Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the defendants appellants, S.T.G. Construction Co., Inc. and Continental Casualty Company.

A. Daniel Fusaro
Clerk

APPENDIX C

Order Denying Petition for Rehearing of the United States Court of Appeals

33077, 33113, 33188

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Plaintiff-Appellee-Appellant,

v.

S.T.G. CONSTRUCTION CO., INC., and CONTINENTAL CASUALTY COMPANY,

Defendants-Appellants-Appellees.

(and two other cases)

A petition for a rehearing having been filed herein by counsel for defendant-appellant-appellee, Continental Casualty Company,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

STERRY R. WATERMAN
HENRY J. FRIENDLY
J. JOSEPH SMITH
Circuit Judges

February 24, 1970

APPENDIX D

Memorandum Opinion and Order #35379, Appealed From of the United States District Court

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

TYLER, D. J.;

This memorandum is filed to treat and resolve the following matters:

1. defendants' motions, ostensibly pursuant to Rule 59, F. R. Civ. P., served on August 5, 1968 for a new trial and related relief; and

2. the issues presented upon the reopening of trial of this case on April 16, 1968[1] (see this court's opinion, findings and conclusions dated February 2, 1968) to permit plaintiff to prove damages, if any, sustained by it as a result of the delay of defendant S.T.G. Construction Co., Inc. ("S.T.G.").

Defendants' Motions

As indicated, defendants have moved for a new trial upon the theory that there was adduced at the reopened trial session on April 16, 1968 "uncontroverted new evidence" which indicates that plaintiff sustained no damage and was entitled to no recovery as held by this court in its opinion of February 8, 1968. Defendant Continental has also moved for an order amending certain findings and conclusions of law contained in this court's aforesaid opinion.

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[1]The court reporter's transcript erroneously recites that the reopened trial date was March 16, 1968.

Memorandum Opinion and Order #35379, Appealed From of the United States District Court

To put the matter as tactfully as possible, there is a certain Alice in the Wonderland flavor to these defense motions. As the moving papers and joint briefs of defendants appear to concede, the newly discovered evidence in question was fully developed at the April 16th hearing. If this were so, I am at a loss, for that simple reason alone, to understand why a new trial is required. I assume, therefore, that defense counsel really wish the court to amend its findings of February 8, 1968 in favor of their clients.

Without extended discussion of the convoluted arguments of the defendants' counsel on these motions, they principally maintain that they learned for the first time upon cross examination of plaintiff's witnesses at the reopened trial session on April 16th that "the plaintiff's cost of completion had not been $290,038, since the United States Army's corp of engineers had paid $239,281.35 of that amount under the Truman-Hobbs Act". Consequently, since this court found in its February 8th opinion that plaintiff is entitled to recover the sum of $100,843.50, which is the amount of the cost to plaintiff in excess of the original contract price for completion, defendants now argue that in the light of the above-quoted statement, the basic duplicity of plaintiff and its witnesses at the principal trial is unmasked. Put differently, defendants now insist that they are completely surprised to learn that the United States, through the Corp of Engineers, is obligated to pay, and has paid in substantial part, 82½% of the cost of completing the fender system which is the subject of this litigation.

The truth is that the defendants should have been aware and actually were aware of these facts not only at the original trial but, earlier than that, during the

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course of the contract work in question. It is scarcely necessary to detail here the considerable evidence adduced at trial which supports this obvious proposition.

But defendants also now suggest that since advances were made by the government to the plaintiff during the course of construction of the fender system, all as clearly contemplated by the Truman-Hobbs Act, see 33 U.S.C. 516, it follows that all right to recover damages is vested in the government and that plaintiff cannot sue for payments made by the government. Under the applicable law, however, the plaintiff as the party to the contract with the defendants has the right to sue on that contract. CPLR §1004; *Morgan* v. *Andreae, et al.*, 295 N. Y. 723 (1946); see also Rule 17(a), F. R. Civ. P. Furthermore, plaintiff and the government clearly can and will adjust their respective obligations, one to the other, under their agreements.

It is regrettable that defendants' counsel, as they have done throughout this litigation, have wasted their efforts in conflicting and unnecessary arguments about issues which have previously been resolved against them or in such a manner not to their total satisfaction. Since the defendants have long been aware that the United States government ultimately will bear a principal share of the contract costs and because plaintiff under applicable law is clearly entitled to bring this action, the various motions of the defendants heretofore discussed are denied in all respects. From this, it follows that this court declines to alter or amend its findings and conclusions of February 8, 1968.

Plaintiff's claims of damages attributable to delays of S.T.G.

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Memorandum Opinion and Order #35379, Appealed From of the United States District Court

At the reopened trial on April 16, plaintiff presented evidence for and defendants presented evidence against six items of damages in the total amount of $60,088.14 which plaintiff claims it sustained as a result of S.T.G.'s delay in performing its work as the contractor on the fender cells. See, generally, *Mosler Safe Company* v. *Maiden Lane S. D. Co.*, 199 N. Y. 479 (1910); *United States* v. *United Engineering and Contracting Company*, 234 U. S. 236 (1914); McCormick, *Damages*, p. 613.

As this court found in its February 8th opinion, S.T.G. was contractually obliged to complete its work on the fender cells on September 28, 1960. The job, however, was not completed until July 5, 1962—and then by another contractor. Consequently, plaintiff has offered, at the invitation of this court, proof on six items of claimed actual damage sustained by reason of the delay during the so-called delay period from September 28, 1960 to July 5, 1962. These six claims will be discussed seriatim hereinafter.

1. *Claimed additional time and efforts by plaintiff's employees and agents—total of $15,479.69.*

In essence, plaintiff's proof here consisted of documents and testimony of Mr. Frank Fico concerning time, work and expenses incurred by him and Mr. Kroll, another employee of plaintiff, in their Baltimore office and at the job-site here in New York. Strangely, defendants offered no substantial specific rebuttals to this evidence; indeed, defendants' sole witness on April 16 tended to support the position of plaintiff that the work and expenses of Fico and Kroll during the delay period were necessary. Nevertheless, although satisfied that a substantial portion of this claim is supported by the record, I do not agree that

plaintiff is entitled to the entire sum of $15,479.69. Such items as vacation allowance, health and welfare contributions, railroad retirement, unemployment insurance tax and the charges for "supervision and accounting" would have accrued without the delay—i.e. these are matters incident to plaintiff's regular employment of both men. Thus, they cannot be charged to defendants as a result of the delay. Consequently, upon reasoning that their time and salaries are the best available measure of plaintiff's delay damages in this area, I find that plaintiff has proved actual payroll expenditures for work done by Fico and Kroll in Baltimore and New York attributable to the delay in the amount of $9,134.[2] In addition, I find that plaintiff is entitled to reasonable transportation and other expenses for Fico and Kroll, which expenses were a consequence of the delay, in the sum of $3,490.[3] Thus, this first claim is allowed to the extent of $12,624.

2. *Claim for extra time and expenses of division engineers—total claim—$14,052.80.*

Mr. Norman L. Ziegler, the division engineer of plaintiff in charge of contract No. 3, testified at the reopened trial on April 16th that during the delay period that he and a staff of from three to four people continued to expend time in relation to the contract. According to Ziegler's testimony and a 23 sheet summary record put in evidence during his testimony, the total amount of time and expense attributable to S.T.G.'s delay during the relevant period came to $24,052.80. In my view, however, a considerable portion of this claimed amount cannot fairly be

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[2] $5,078.42 for Fico; $4,055.54 for Kroll.

[3] $2,262.45 for Fico; $1,227.15 for Kroll.

assessed against defendants. To begin with, since the men who worked under Ziegler during the delay period were regular employees of plaintiff, I find it unreasonable to attribute directly to delay by S.T.G. such constant items as railroad retirement, unemployment insurance payments, overhead charges, annuity contributions and the like as are shown in the Ziegler work sheets in evidence as Exhibit No. 124. As implied in my discussion regarding plaintiff's first claim, the railroad would have made such payments for these employees in any event. Second, the per diem payments of $6 for each railroad employee as shown on the Ziegler work sheets are not explained, to my satisfaction at least, as being necessary concommitants or delay by S.T.G. Third, I am unable to determine that the automobile rental charges as claimed here are attributable to delay as such. Thus, subtraction of the aforementioned items on the Ziegler work sheets reduces this claim to the sum of $13,182. This reduced sum is allowed, it being specifically noted that the defense offered no specific evidence or even argument that the work described by Ziegler in his oral testimony and written work sheets was not attributable to delay.

3. *Claim for personnel and overhead of the United States Army Engineers charged during the delay period—total claim—$10,610.04.*

Mr. Leo Spritzer of the New York District of the United States Army Engineer Corps testified at the reopened trial. At all times relevant to this dispute, he was Chief Office Engineering Branch, Construction Division with the assigned task of keeping control or budgets of various projects, including contract No. 3. He was contemporaneously aware of delay in completion of contract No. 3 and computed costs arising from this de-

lay. Upon his testimony and the records in evidence in support of his testimony, I find that these charges attributable to delay amounted to $10,610.04. Ziegler, by the way, testified that the Corp of Engineers will charge this amount to plaintiff. In other words, the government has taken the postion that plaintiff owes this total amount as claimed as an extra attributable to delay and completion of the fender cells. This claim, then, is allowed in full.

4. *Claim of additional expenses in the form of time and expenses for the architect-engineers—total claim—$9,275.*

Mr. George Vaccaro, an engineer employed by Parsons, Brickerhoff, Hall & MacDonald, the architect-engineers for plaintiff on the project, testified that employees of his firm did various work during the delay period on revised plans then submitted, at least in part, by S.T.G. According to him, the total amount of labor and services furnished by six employees of the architect-engineers came to a total of $9,275. Unfortunately, in analyzing Vaccaro's testimony I am unable to tell whether this extra work is attributable to the breach of S.T.G. or to delay as such. This problem is further complicated by Vaccaro's frank admission that a good deal of this time was in relation to the repairs done by Spencer, White & Prentis, Inc. ("SWP") to previously completed work of S.T.G. Consequently, this entire claim is disallowed for failure of proof and for the added reason that, as Vaccaro admitted, his firm has never billed plaintiff for this amount or any part thereof.

5. *Claim for interest on increased construction costs —total claim—$6,050.61.*

Based simply on the rather conclusory testimony of Frank Fico, plaintiff has made claim for interest at the rate of 6% on increased construction costs of $100,843.50 for the year July 5, 1961 to July 5, 1962, amounting to $6,050.61. As plaintiff's counsel points out, this period approximately coincides with the termination of S.T.G.'s contract and the date of completion by SWP. Although I understand plaintiff's difficulties in this area, I can perceive no firm evidence that a sum or sums approximating this amount were actually borrowed by plaintiff for the purpose of payments for completion of contract No. 3. Similarly, I find no evidence that plaintiff's capital funds in this amount were tied up and "non-working"—i.e. not producing income as they might have but for the delay. Hence I am constrained to deny this item in its entirety for failure of proof.

6. *Claim for legal services attributable to the delay— total claim—$4,620.*

Here plaintiff claims legal fees paid to Messrs. Alexander and Green for certain work done by that firm as counsel for plaintiff during the delay period. I have no difficulty in finding that the charges are fair and reasonable for the amount of time and effort expended by counsel. Nevertheless, I am not convinced by any available evidence that these services were required by the delay of S.T.G. as such. As I view what happened during the relevant period, the services of counsel were required by the fact that defendant S.T.G. breached its contract with plaintiff; in other words, counsel's efforts were directed toward negotiations with S.T.G. and the

surety to achieve completion or, alternatively, to pave the way for this litigation. In any case, assuming that I am incorrect in this view, I cannot say that such legal expenses were a reasonably foreseeable item of damages in the event of delay. I have not found any persuasive authority for the proposition that under such circumstances, the cost of legal services should be an item of damages to the plaintiff. Thus, this claim is denied in its entirety.

To recapitulate, it is ruled that defendants' motions are denied. Further, I find that plaintiff, upon the evidence adduced at the reopened trial, is entitled to recover additional damages from defendants for delay in the total sum of $36,416.04. A judgment for this amount plus the sum awarded to plaintiff in this court's findings and conclusions of February 8, 1968 should be entered without delay. Exhibits should be picked up from chambers.

It is so ordered.

November 25, 1968.

H. R. Tyler, Jr.
U.S.D.J.

APPENDIX E

Judgment of the United States District Court

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLES]

This action came on for trial before the Court, Honorable H. R. Tyler, Jr., District Judge, presiding, and the issues having been duly tried on April 19, 20, 24, 25, 26, 27, 28 and May 1, 1967, and the Court having duly rendered its opinion and decision and having made its findings of fact and conclusions of law dated February 8, 1968, and the Court in said opinion having authorized a reopening of the trial at plaintiff's election to permit the plaintiff to submit proof of actual damages resulting from the delay by defendant S.T.G. Construction Co., Inc., and the plaintiff having elected so to do and the trial having resumed for that purpose on April 16, 1968 and the Court having rendered its memorandum and order dated November 25, 1968, it is hereby

ORDERED AND ADJUDGED:

1. That the plaintiff, The Staten Island Rapid Transit Railway Company, have judgment against the defendants, S.T.G. Construction Co., Inc. and Continental Casualty Company for the sum of $137,259.54, together with interest thereon at six per cent per annum from July 5, 1962 to date in the sum of $52,819.98 and together with its costs of this action to be taxed.

2. That the defendants' counterclaims against the plaintiff be and the same hereby are dismissed on the merits.

3. That the defendant Continental Casualty Company is awarded judgment upon its cross-claim against defendant S.T.G. Construction Co., Inc. in the sum of $118,904.04 plus any portion of the judgment in favor of plaintiff which is paid by Continental Casualty Company with interest thereon at six per cent per annum from the date or dates when Continental Casualty Company paid such amounts on behalf of S.T.G. Construction Co., Inc.

Dated at New York, New York, this 3rd day of December, 1968.

JOHN J. OLEAR, JR.
Clerk of Court

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Supreme Court, U.S.
FILED
APR 27 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

JUNE TERM 1970

No. 1492

S.T.G. CONSTRUCTION CO., INC.,
Petitioner,

—against—

STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX F

EMANUEL HARRIS,
Attorney for Petitioner,
30 Vesey Street,
New York, New York 10007
Tel. No. 212-267-5700

APPENDIX F

Findings of Fact and Conclusions of Law—Opinion #34451—Tyler, J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Alexander & Green, Esqs., New York City, by Donald M. Dunn, Esq. and Donald B. Ferens, Esq., Attorneys for Plaintiff.

Max E. Greenberg, Esq., New York City, by Louis Cantor, Esq., Attorney for Defendant S.T.G. Construction Co., Inc.

Donald B. Knight, Esq., New York City, Attorney for Defendant Continental Casualty Company.

TYLER, D. J.

This breach of contract case was tried without a jury before the court on April 19, 20, 24, 25, 26, 27, and 28, and May 1, 1967. Post-trial memoranda and proposed findings were submitted by September 15, 1967.

Upon the proofs adduced at trial, and in consideration of the legal arguments and proposed findings of counsel for the litigants, the following findings of fact and conclusions of law are set forth:

Findings of Fact

1. Plaintiff was and is a corporation organized and existing under the laws of the State of New York.

2. Defendant S.T.G. Construction Co., Inc. ("S.T.G.") was and is a corporation organized under the laws of New Jersey and either qualified to do business in New York or actually doing business in New York; during all times here relevant, its principal office was located in New York.

Findings of Fact and Conclusions of Law—Opinion #34451—Tyler, J.

3. Defendant Continental Casualty Company ("Continental") was and is a corporation organized under the laws of the State of Illinois and qualified to do business in the State of New York.

4. In the 1940's, plaintiff, at the direction of the Secretary of the Army, commenced plans to demolish the then existing swing-type railroad bridge over the Arthur Kill between New York and New Jersey and construct a vertical lift bridge in accordance with the requirements and provisions of the Truman-Hobbs Act, 54 Stat. 497 (1940), as amended, 33 U. S. C. §§ 511-523 (1964).

5. Briefly described, this project was to be accomplished in three parts which were the subjects of three separate contracts. Contract No. 1 provided for the erection of the substructure of Piers No. 1 and 2 and the approaches of the bridge. Contract No. 2 was for the superstructure of the new bridge and removal of the existing swing-span of the old bridge. Finally, Contract No. 3, which is directly involved in this litigation, was for the demolition of the center pier of the old bridge, the old abutments and the wooden trestle; Contract No. 3 also provided for construction of a new fender system for so-called Pier No. 1 located on the New York or Staten Island side of the tidal water course known as the Arthur Kill.

6. The cost of this project was shared by plaintiff and the United States Government. Consequently, the three contracts above-described were negotiated and entered into subject to the approval of the Chief of Army Engineers in Washington. Specifically, Contract No. 3 was entered into in New York by plaintiff with defendant S.T.G., subject to the approval of the Chief of Army Engineers.

7. Plaintiff and the government retained a reputable architect-engineer firm, Parsons, Brinckerhoff, Hall and

MacDonald ("architect-engineer"), to prepare the contract plans and specifications for all contracts, including Contract No. 3.

8. Prior to its execution, Contract No. 3 was advertised for bids and prospective bidders were furnished plans, specifications, bidding and contract forms. Moreover, plaintiff had theretofore obtained certain core borings showing subsurface conditions in the Arthur Kill in the area where the fender cells were to be constructed. These core borings were made available to bidders for inspection at plaintiff's Staten Island office. At the same place, there was available for inspection information, particularly engineering drawings, as to the foundation of Pier No. 1 which the fender system in question was designed to protect.

9. On November 9, 1959, plaintiff received six bids to perform Contract No. 3. These bids were received from defendant S.T.G. and five other heavy construction contractors. S.T.G. was the lowest and successful bidder at the total price of $833,140.00. Interestingly, the four lowest bids were close in total amount; however, S.T.G.'s bid for construction of the fender system for Pier No. 1 was $56,000.00 less than the next nearest bid.

10. S.T.G.'s bid was accepted by plaintiff in a letter to S.T.G. dated January 18, 1960.

11. A formal contract known as Contract No. 3 was entered into in writing between plaintiff and S.T.G. on January 18, 1960. The contract was accompanied by and embraced by its terms specific plans which set forth S.T.G.'s basic responsibilities to achieve the work desired to be accomplished. Among other things, Contract No. 3 required S.T.G. to furnish all materials, supervision, labor, equipment and transportation for performance

of the work. The contract further provided the following specific provisions or conditions:

"2. *Period for Completion:* (p. C-1, 2) The date of starting work shall be fixed in a written notice from the Engineer to the Contractor, which notice shall be mailed to or served upon the Contractor not less than ten (10) days before the starting date fixed therein. The Contractor agrees to commence the work on or before the starting date fixed in said notice, * * * and to complete the entire work as herein described within 240 calendar days after the starting date fixed in said notice.

Upon written application of the Contractor, the Chief Engineer may for reasons which in his opinion are beyond the Contractor's control, consent, in writing, to an extension of said time of completion. * * *

Inasmuch as the damage and loss to the Company which will result from a failure by the Contractor to complete the entire work within the 240-day period herein specified, including any extension thereof fixed and approved as herein provided, may include interest on moneys borrowed for construction and loss from the inability of the Company to enter into possession, the damages to the Company for delay in a case of such failure or failures on the part of the Contractor shall be liquidated in the amount of Two Hundred Fifty Dollars ($250.00) per day for each consecutive calendar day (Sundays and holidays included) by which the Contractor shall fail to complete the work in accordance with the provisions hereof.

8. *Contractor's Understanding:* (p. C-5) It is understood and agreed that the Contractor has,

by careful examination, satisfied himself as to the nature and location of the work, the conformation of the ground, the sub-surface conditions, the character, quality and quantity of the materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can in any way affect the work under this Contract. No verbal agreement or conversation with any officer, agent or employee of the Company, either before or after the execution of this Contract, shall affect or modify any of the terms or obligations herein contained.

9. *Contractor's Risks:* (p. C-5) The work covered by this Contract shall be at the risk of the Contractor in every respect and he shall be responsible therefor until it is completed and accepted. This responsibility shall include damage to and loss of any material furnished and delivered for incorporation in the work.

31. *Liens:* (p. C-12) If at any time there shall be evidence of any lien or claim for which the Company might become liable, and which is chargeable to the Contractor, the Company shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify the Company against such lien or claim, and if such lien or claim be valid, the Company may pay and discharge the same, and deduct the amount so paid from any moneys which may be or become due and payable to the Contractor

47. *Withholding of Payment:* (p. C-15, 16) If the Contractor fails to meet and pay all of his

just obligations oustanding for labor, materials or supplies at the time when an estimate for payment is due him, or if any liens, claims or demands arising out of or in connection with the work or its permance shall be outstanding at the time any payment may be due or is likely to be made thereafter, or if any claims arising out of or in connection with the Contractor's operations under this Contract are made against the Company by any other person than the Contractor, or if in the opinion of the Chief Engineer, the Contractor is not proceeding with the work in accordance with the provisions of this Contract, the Company shall have the right to withhold out of any payments, final or otherwise, such sums as the Chief Engineer may deem ample to protect it against delay or loss or to assure the payment of just claims of third persons, and at its option, as agent for the Contractor, to apply such sums in such manner as the Chief Engineer may deem proper to secure such protection or to satisfy such claims. Such application shall be deemed payments for the Contractor's account. The Engineer may withhold payment to the Contractor on account of the failure of the Contractor to fully comply with any requirements of this Contract.

49. *Monthly Estimate:* (p. C-16) Except as herein otherwise provided, payments for work done under this Contract will be made monthly as the work progresses. So long as the work herein contracted for is prosecuted in accordance with the provisions of this Contract, and with such progress as may be satisfactory to the Engineer, the said Engineer will, on or about the first day of each month, make an approximate estimate of the pro-

portionate value of the work done and of acceptable material furnished or delivered at the site of the work up to and including the last day of the previous month. The amount of said estimate, less a retained amount of ten (10) percent and less previous payments, shall be paid to the Contractor as soon thereafter as possible. The work and material included in such monthly estimates shall be the property of the Company but it is expressly agreed to by the parties hereto that no estimates given or payments made under this Contract, except the final payment, shall be conclusive evidence of the performance of this Contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials. The retained amount herein provided for will not become payable until the work covered by this Contract has been completed to the satisfaction and approval of the Engineer, and until after the payment of all labor, material and other costs of construction are proven to his satisfaction.

52. *Failure of Performance by Contractor:* (pp. C-19, 20) If the Contractor, in the opinion of the Chief Engineer, shall at any time fail to comply with the provisions of this Contract, the Chief Engineer may, at his option, notify the Contractor, in writing, to remedy such failure. If the Contractor at the end of ten days after such notice has failed to comply therewith, the Company may, at its option, terminate the employment of the Contractor under this agreement and relet the whole or any part of the unfinished work without notice to the Contractor, or may take possession of the Contractor's materials and equipment,

located on the premises, and employ such forces as may be necessary to finish all or any part of the work. In case the whole or any part of the work is relet as provided herein, the Contractor shall be charged with the full cost to the Company of the work performed under the New Contract and shall be credited with the amount that the Company would have paid the Contractor for said work, under this Contract. • • • The options herein provided for the Chief Engineer and for the Company shall not be exclusive of, but in addition to, any other remedies.

56. *Adjustment of Disputes:* (pp. C-20, 21) It is agreed that the decision of the Chief Engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each and every one of said parties do hereby waive any right of action, suit or suits or other remedy in law or otherwise, by virtue of the covenants and provisions herein, so that the decision of said Chief Engineer shall, in the nature of an award, be final and conclusive of the rights and claims of said parties."

12. Central to the issues in this litigation was one of the items of work contractually provided to be performed by S.T.G. and relating to the construction of a series of eight cells flanking Pier No. 1 of the new bridge. These cells were intended to protect Pier No. 1 from possible damage from navigation in the Arthur Kill and from future channel dredging in that area. The contract plans and specifications called for the erection of five of these cells designated as A, B, C, D and E along the northerly side of Pier No. 1. It was further provided

that three cells, F, G and H, were to be erected along the southerly side of Pier No. 1. Briefly described, each of these cells was to be cylindrical in shape and approximately 27 feet in diameter. The circumference of each cell was to be constructed of interlocking sheet steel or sheet piling which was to be anchored in the channel bed. The areas of the cells within the outer circumference of sheet piling were to be excavated and then filled with a heavy substance such as broken stone or concrete and broken stone. The pertinent sections of the contract specifications relating to the construction of these fenders or fender cells are set forth hereinafter:

"*Article 2. Depth and Dimensions* (p. II-1)

All material inside Cells D and E, shall be excavated down to the top of undisturbed rock, and rock shall be excavated to the extent necessary to permit driving the sheet piling to the required tip elevations as shown on the drawings, and in conformance with Section IV, Construction of Fender System for Pier No. 1.

All other cells are to be excavated to good earth as determined by the Engineer, except that if necessary to get the sheet piling down to required depth, the Contractor shall excavate to rock and remove rock to enable driving the sheet piling to elevations shown on the drawings.

Article 4. Methods and Protection (p. II-1)

The Contractor shall protect the sides of all excavations from caving by providing and placing suitable sheeting, shoring and bracing, except that when conditions permit and with the approval of the Engineer, the Contractor may, on his own responsibility, slope the sides of the excavation instead of providing protection, but no allowance for

additional quantities required by this method will be made. • • •

The Contractor shall submit to the Engineer for approval a plan of his proposed method of excavating rock. Blasting shall be employed adjacent to the new Pier No. 1, and the Contractor shall close line drill along the face of said Pier as required to protect the new Pier No. 1. The plan shall include size and spacing of line drill holes, a system of relief, spacing of blast holes and the method of delayed blasting. Any approval by the Engineer, however, of such plan and methods of rock excavation will not relieve the Contractor of his responsibility for the safe support of adjoining structures and any damage thereto shall be repaired by the Contractor at his own expense.

Article 5. Construction Methods (p. IV-3)

It is required that all steel sheet piling penetrate to the tip elevations shown on the plans, and that rock be removed, if necessary, to permit the sheets to penetrate to the required elevations.

Except at Cells 'D' and 'E', wherever the sheet piling can be driven to the required tip elevations, the excavation within the cells shall be carried only to the level of good earth, as determined by the Engineer. After approval of the excavation by the Engineer, the interior of the cells shall be filled with rock fill.

At Cells 'D' and 'E', and at other cells wherever it is impossible to drive the sheet piling to the required tip elevations, all material within the cells shall be excavated to the top of undisturbed rock. Rock shall then be excavated by an ap-

proved method to the extent necessary to permit the sheets to penetrate to the required tip elevations. This work shall preferably be done in the dry, and the Contractor shall provide, if necessary, all equipment and dewatering pumps required to accomplish this result. After the excavation is completed and cleared of all loose material, the cells shall be allowed to fill with water. The steel sheet piles shall then be redriven to the required tip elevations.

For cells other than 'D' and 'E', the entire excavation shall be back filled with rock fill. For cells 'D' and 'E', the bottom of the cell shall be filled with concrete fill up to elevation —35, and the remainder of the cell shall be filled with rock fill.

The Contractor shall provide all necessary templates and internal bracing to maintain the shape of the sheet pile cells throughout the construction, and shall especially support this bracing during the redriving of the sheet piling. The Contractor may excavate around the outside of the cells to relieve the lateral pressures against the sheets during the construction of the cells, but all material removed behind the cells shall be replaced with sand or other approved granular material.

Before commencing work, the Contractor shall submit for the approval of the Engineer a detailed statement, supplemented by drawings, of the methods he proposes to use for the construction of the steel sheet piling cells."

13. As required by Contract No. 3, S.T.G. furnished a performance and payment bond executed by Continental as a compensated surety in the total amount of the con-

tract price, $333,140.00. So far as is pertinent here, the bond provisions included the following:

> "And the Surety, for value received for itself and its successors and assigns, hereby stipulates and agrees that the obligations of said Surety and of its successors and assigns, and this bond shall in no way be impaired or affected by any extension of time, modification, omission, addition or change in or to the said Contract or the work to be performed thereunder, or by any payment thereunder before the time required therein, or by any waiver of any provision thereof, or by any assignment, subletting or other transfer thereof, or any part thereof, or of any work to be performed, or of any moneys due or to become due thereunder; and the said Surety, for itself and its successors and assigns does hereby waive notice of any and all such extensions, modifications, omissions, additions, changes, payments, waivers, assignments, subcontracts and transfers, and hereby stipulates and agrees that any and all things done and omitted to be done by and in relation to executors, administrators, successors, assignees, subcontractors, and other transferees shall have the same effect as to said Surety and its successors and assigns, as though done or omitted to be done by and in relation to said Principal."

14. In accordance with the contract provisions, plaintiff notified S.T.G. in writing to proceed with performance beginning February 1, 1960. The contract provided that S.T.G. was to complete its work in 240 days or by September 28, 1960.

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15. Prior to its submission of its successful bid, S.T.G., through its representatives, visited the work site on one day before preparing its bid.[1] S.T.G., however, did not inspect the available core borings, nor did it examine the information relating to the construction of Pier No. 1 which was available, along with the core borings, at plaintiff's Staten Island office. This information and the plans for Contract No. 3 revealed that the existing sheet pilings surrounding Pier No. 1 were driven only to rock, that the pier foundation itself was at an approximate elevation of minus 50 feet below mean low water and that the foundation for Pier No. 1 was constructed "in the dry".

16. Commencing work on or shortly after February 1, 1960, S.T.G. subcontracted more than three-quarters of the work which it was contractually obliged to perform under Contract No. 3. The principal subcontractor for S.T.G. was Great Lakes Dredge & Dock Company ("Great Lakes"), which performed demolition work and removal of the rock foundation of the center pier and the fender system of the old bridge. So far as can be determined from the evidence, Great Lakes performed its work in an efficient and timely manner for a total subcontract price of $370,565.10. For the work performed by Great Lakes, however, plaintiff paid to S.T.G. the gross amount of $524,874.50, less the contract stipulated 10% reservation.

17. S.T.G. with its own supervisory and work personnel commenced a small amount of demolition work and various attempts to construct the fender system for

[1] S.T.G.'s president, Saul Grand, who is not an engineer, admitted that he did not examine the core borings; however he did look at the engineering drawings at Staten Island during his "pre-bid" visit.

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Pier No. 1. Almost immediately S.T.G. encountered difficulties. Without extended discussion, the efforts of S.T.G. in this regard can be fairly summarized as follows:

a. By letters and a sketch or blueprint dated February 26, 1960, S.T.G. submitted to plaintiff a method of predrilling along the perimeter of cells D, E and F if required and then driving sheet piling through the shale to the required tip elevations. Plaintiff's representatives considered this proposal and found it to be generally satisfactory as they acknowledged in writing to S.T.G. To describe this initial method submitted by S.T.G. in more detail, this was the so-called "wet method" of construction of the cells. The contract specifications, incidentally, did not specify or require a preferred method for doing this portion of the job, but the specifications did suggest the so-called dry method for constructing the fender cells in question.[2]

b. In late April, 1960, S.T.G. unsuccessfully attempted through a well drilling subcontractor to put casings down preparatory to drilling with a four inch diameter drill at the northwest corner of Pier No. 1.

c. In July, 1960, S.T.G. attempted auger drilling into the rock in or near cell E with an eighteen inch diameter drill. S.T.G. in late July also attempted drilling with a fifteen inch churn drill. In August, 1960, S.T.G. endeavored to drill at cells D and E with a three inch tractor drill. So

[2]For a persuasive expert evaluation of permissible methods of construction under the contract and specifications, see the testimony of plaintiff's witness Philip Rutledge.

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far as the evidence indicates, there was no effort to drill during this period or periods for any of the cells on the south side of Pier No. 1. All of these attempts by the well drilling subcontractor of S.T.G. to put casings down preparatory to drilling were unsuccessful and ineffectual.

d. S.T.G., however, was able to drill four holes into rock with the auger and churn drills at cell E location to required elevation. Nevertheless, S.T.G. was unable to keep alignment of the holes through the overburden and in the rock. S.T.G. attempted to drive sheet piling down to break the "web" of rock between the first and second hole. This attempt failed because the sheet metal piling was obviously not designed and hence was not strong enough for such a purpose.

e. By late August, 1960, it was apparent that S.T.G. was unable to effectively implement its own plan for drilling and sinking the fender cells. At all cells on which it worked, S.T.G. drove most of the sheet piling to the rock surface or to the point in the overburden where the piling met refusal. Moreover, some of the sheet piling was put in backward, thus causing the cells to lose a considerable percentage of their desired and specified strength.

18. At a meeting held on the job site on August 4, 1960 at the request of S.T.G., representatives of S.T.G. stated that they were having difficulties in placing the fender sheets into the rock by S.T.G.'s own selected method. S.T.G. also criticized what it claimed to be the specific method set forth in the specifications. Plaintiff, the Army engineers and the architect-engineer reminded S.T.G. that it had not tried the recommended blasting

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procedures as set forth in the specifications. They also directed that S.T.G. complete the job in accordance with the contract.

19. Parenthetically, it should be noted that shortly after this meeting, S.T.G. made inquiries as to the cost and specific methods of blasting. After receiving an estimate from the L & J Concrete Breaking Company, S.T.G. proceeded no further with its plans for blasting and, in fact, never attempted to blast in any manner.

20. According to the evidence in the case which I find to be credible and persuasive, there were at least three practical and feasible construction methods by which a contractor such as S.T.G. could have constructed fender cells D, E, F and G under the original plans and specifications of Contract No. 3. These three methods may be fairly summarized as follows:

a. *The wet construction method known as the "glory-hole" method.* Briefly described, this method contemplates excavation or dredging in the area of the cells to rock to be followed by drilling, blasting and excavating rock in trenches under water to the required elevations along the lines of the fender cell walls. Upon completion of these trenches, sheet pilings for the cells could then be set in place and trémie concrete poured at the base.

b. *The pre-drilling method attempted by S.T.G.* This method could be successfully used through the means of a template to act as a guide for driving interlocking casings. The casings could be interlocked to one another by means of sliding joints in order to permit the casings to be driven one at a time in proper alignment through the overburden to the top of the rock. Thereafter, a drill could be

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inserted within the casing and the rock drilled to a required depth or, more accurately, an overdepth in order to take care of the drilling debris. Further, this method would contemplate the use of a heavy spud or chisel to break down the rock webbing between the holes with the debris again falling into the drilled overdepth. Finally, then, the sheet pilings could be set and redriven to required depths where the trough or trench had been created by this drilling method.

c. *Another "dry method" of construction by means of a cut-off wall or exterior cofferdam outside of the fender cells.* These cofferdams could be driven to rock to create a water-free or relatively water-free area for construction of the fender cells in the dry. This would permit the rock to be broken in stages by blasting or the use of jackhammers. Thereafter, the sheet metal sections could be driven to the desired elevations and tremie concrete could be placed at the bottom of the cells. This exterior cofferdam method would eliminate any possibility of a blow.

21. Despite the fact that the so-called rear fender cells A, B, C and H presented no signficant construction problems because the sheet pilings only had to be driven to the rock surface, S.T.G. did not even manage to complete these particular cells.

22. Again on August 25, 1960, S.T.G. requested and was granted permission by plaintiff to consult with the United States Army engineers concerning an alternative method of stabilizing the fender cells fronting the channel by use of caissons. Thereafter, S.T.G., by letter of September 6, 1960, submitted or recommended to plaintiff a dowel method and later by letter of September 13, 1960

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an H-beam method for stabilizing cells D and E, both of which were then considered inadequate for the purpose of protecting Pier No. 1. Both proposals, even from a lay point of view, were incomplete, superficial and without supporting engineering data. Consequently, it is not surprising that plaintiff promptly rejected both proposals or "plans".

23. On September 28, 1960, S.T.G. had not completed its work under the contract, particularly with respect to the matters to be done in the erection of the fender cells. Approximately one month later, and specifically on October 27, 1960, S.T.G. pulled its work crews and personnel from the job. Concededly, on the latter date the fender system for Pier No. 1 was in an unfinished state.

24. Notwithstanding the fact that its personnel had quit the job on October 27, on the following day October 28, 1960, S.T.G. submitted to plaintiff a preliminary sketch for a drilled-in caisson method to stabilize cells D and E. This method had been prepared and sketched as a result of conferences and consultations between S.T.G. and the firm of Spencer, White & Prentis, Inc. ("SWP"). At the request of plaintiff, a more complete plan was submitted during November, 1960 by or for S.T.G. By letter of December 2, 1960, plaintiff advised S.T.G. that it required certain revisions of this plan. S.T.G., in attempted compliance with plaintiff's request, forwarded a revised plan, which again plaintiff's engineers reviewed and submitted to the architect-engineer for review and approval.

25. There then ensued exchanges of correspondence and telegrams concerning a proposed alternative design and plan regarding cells D, E, F and G. By letter dated December 13, 1960, S.T.G. advised that it would carry out the alternate design for these cells at no extra cost to

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plaintiff or the government. At the request of plaintiff, S.T.G. finally sent to plaintiff special specifications dated January 10, 1961, which specifications were revised by plaintiff's engineers on January 25, 1961 in order to expedite completion under the alternative design and method. By letter dated February 16, 1961, plaintiff wrote to S.T.G. and approved the alternate method of stabilizing cells D, E, F and G in accordance with the revised plan and revised special specifications. At the same time, plaintiff submitted a proposed Amendment No. 1 to the contract and directed S.T.G. to proceed immediately to complete the remaining work under the contract as amended. S.T.G. did not specifically reply to plaintiff's letter; however, S.T.G.'s attorney by letter dated February 28, 1961 agreed on behalf of S.T.G. that the contract would be completed without additional cost but noted that S.T.G. refused to pay liquidated damages as required by the original contract. Contract No. 3, incidentally, was never formally amended.

26. In response to the aforesaid letter of S.T.G.'s attorney, plaintiff advised in writing that it would recommend to the Army engineers that the contract period be extended to September 30, 1961 if S.T.G. were to resume work promptly on May 1, 1961; however, plaintiff also advised S.T.G. and the surety that it would not waive the liquidated damages requirement from the period beginning September 28, 1960 to April 30, 1961.

27. At this point, there seems to have been a lull or break-down in communications between the parties; it also appears that no work was done by S.T.G. or anyone on its behalf under the alternate design.

28. Finally, on May 19, 1961, there was another meeting between representatives of plaintiff and S.T.G. At that meeting, a representative of plaintiff indicated to

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S.T.G. that S.T.G. would be granted a twelve months' extension of time to September 27, 1961 upon condition that S.T.G. would complete the contract within that extended period.

29. By letter dated June 29, 1961, plaintiff notified S.T.G. that it would terminate Contract No. 3 unless S.T.G. commenced work on the uncompleted fender cells within ten days of the date of the letter. A copy of this letter was sent by plaintiff to the surety. There is no evidence that S.T.G. answered the letter or commenced the necessary completion work as demanded. Consequently, plaintiff on July 14, 1961 wrote S.T.G. another letter terminating the contract in purported compliance with paragraph 52 thereof. The surety was also notified of this termination.

30. Beginning with plaintiff's letter of September 14, 1960 to the surety, plaintiff kept the surety informed as to the status of Contract No. 3, the compliance or noncompliance by S.T.G. with the work schedules, any liens and claims filed by subcontractors and material men, and the like. As heretofore indicated, the surety was informed at the meeting of April 13, 1961 of plaintiff's view that S.T.G. had failed to perform in accordance with the original plans and specifications and the approval by plaintiff of an alternate method or methods for completing cells D, E, F and G.

31. Although the surety never answered plaintiff's letters of June 29 and July 14, 1961 as aforesaid, the surety did solicit a bid or bids for completion of the fender cell system from SWP upon receiving information that S.T.G. was no longer on the job.

32. On or about July 10, 1961, one of plaintiff's engineers prepared a memorandum setting forth the items of work remaining to be completed under Contract No. 3. Th

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after, by letter dated July 24, 1961, plaintiff requested bids from contractors to complete the work under Contract No. 3. In so doing, plaintiff used and submitted to bidders the original plans and specifications. On that basis, bids were received for such completion work from three contractors. The lowest bid was from SWP in the amount of $469,000.00. Analysis of SWP's low bid indicated that a substantial item for performance according to the original contract plans and specifications was removal of the sheet pilings which had already been put in by S.T.G., drilling and redriving of new sheet pilings. This item of cost exceeded the sum of $200,000.00.

33. The sheet pilings which had been previously installed by S.T.G. were out of plumb, and some of these pilings were in backwards. Moreover, certain of the pilings installed by S.T.G. were bent and distorted below water.

34. Upon receipt of the three bids as aforesaid, plaintiff and the Army engineers decided that the relatively high cost for completion in accordance with the original plans and specifications was not satisfactory or desirable. For this reason and because of the questionable condition of those sheet pilings which had been installed by S.T.G., plaintiff and the Army engineers then decided to solicit new bids for completion of the Contract No. 3 work upon the concept that construction of cells D, E, F and G would be accomplished by the caisson method.

35. On the latter basis, bids were received from the same three contractors. Again the low bid was submitted by SWP, this time in the amount of $239,500.00.

36. By letter dated September 20, 1961, plaintiff requested consent of the surety to award the contract to SWP; the surety did not respond to this request. By

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letter dated September 22, 1961, notification of SWP's low bid to complete was sent to S.T.G.

37. As of September 27, 1961, plaintiff entered into a written agreement with SWP for completion of the fender cell work. SWP almost immediately proceeded with the work provided in the contract.

38. SWP's personnel discovered that some of the sheet pilings which had been driven by S.T.G. in cells D, E, F and G were out of interlock and curled or bent. Accordingly, SWP proposed to plaintiff two alternative remedial procedures for correcting the discovered defects:

(1) covering the openings with steel plating or wood and raising the level of tremie concrete within the cells, or

(2) extracting the necessary sheet pilings and redriving new pilings.

SWP also submitted estimates of the cost of remedial work for each cell. Plaintiff thereupon considered SWP's proposals and authorized SWP to proceed by the first and more economical alternative method at a total extra expense of $50,538.00. Extensions of time totaling 89 days were granted by the chief engineer to SWP on account of this necessary remedial work.

39. Plaintiff notified S.T.G. and the surety in writing concerning the defects in the sheet piling installed by S.T.G. and advised of the cost and additional insurance required. So far as can be determined, neither the surety nor S.T.G. objected or responded to these notifications in any way.

40. SWP completed the remedial work and all of its contract completion work by July 5, 1962.

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41. As heretofore indicated, the remedial work accomplished by SWP was covered by certain change orders in its contract with plaintiff. A total amount under these change orders of $50,538.00 was paid by plaintiff to SWP for this work. The work done and the total amount paid for such remedial work were necessary and reasonable.

42. Plaintiff and the Army engineers accepted the completed contract work of SWP on July 5, 1962. On account of its contract, SWP received from plaintiff a total sum of $290,038.00, which sum included the aforementioned $50,538.00 on account of remedial work. This total sum for completion and remedial work was fair and reasonable under all the circumstances of this case.

43. The additional cost to plaintiff over and above the original contract price (as agreed upon between plaintiff and S.T.G.) came to $100,843.50 ($290,038.00 less the sum of $189,194.50, which was the amount left still to be paid under the original S.T.G. contract).

44. According to the original contract between S.T.G. and plaintiff, estimates were made at the beginning of each month for work completed by S.T.G. during the prior month. On the basis of these estimates, plaintiff made payments to S.T.G. less ten percent retainage. Plaintiff's chief engineer had the responsibility to certify what work had been performed and what payments should be made each month. The chief engineer made certifications for payment to S.T.G. for the months of February, March, April, May and June, 1960; these payments to S.T.G. totalled $643,945.50.

45. In early August, 1960 before any estimate of S.T.G.'s work for the month of July, 1960 was certified for payment, Great Lakes advised plaintiff that S.T.G. still owed to it as a subcontractor for dredging work the sum

of $32,909.75. Also in August, 1960, Bethlehem Steel Company ("Bethlehem") notified plaintiff that it had a claim against S.T.G. for $26,040.77 representing a balance due for materials furnished to S.T.G. At or about the same time, plaintiff was also notified of other unpaid material and labor claims against S.T.G. These claims and liens against S.T.G. totalled over $100,000.00; indeed, the claims of Great Lakes and Bethlehem exceeded any sum that would be due to S.T.G. for work performed under the contract after June 30, 1960. Consequently, pursuant to Articles 31 and 47 of the original contract, plaintiff properly withheld any further payments to S.T.G. after June, 1960.

46. Continental paid a total sum of $118,904.04 to lienors and creditors, including, apparently, Bethlehem and Great Lakes, for labor and materials furnished to S.T.G. incident to its work under Contract No. 3.

Conclusions of Fact and Law

1. The law of New York applies to this controversy.

2. Contract No. 3, including the plans and specifications thereof, specified in respect to completion of the fender system an end result which was penetration of the sheet pilings to desired elevations, either into rock or into the overburden, for the cells fronting on the channel. Contrary to defendant S.T.G.'s arguments, it was free to use any engineeringly sound and approved method to accomplish that end result.

3. The contract plans and specifications relative to the fender system were practicable and possible of performance by a competent contractor. Specifically, neither the plans and specifications by their terms nor the exigencies of underwater engineering and construction pre-

cluded S.T.G. from proceeding to completion by means of one of at least three acceptable methods. These three methods were (1) the "glory-hole" method; (2) the cofferdam method; and (3) the pre-drilling method.

4. S.T.G. breached its contract with plaintiff by abandoning the job and failing to complete the fender system in accordance with the contract. More particularly, S.T.G. did not prudently inspect the available core borings and other information prior to submitting its bid.[3] S.T.G. did not have sufficient engineering and construction personnel who were adequately trained and prepared for this kind of work. S.T.G. did not thoroughly explore the available alternative methods for completing the fender cell work at a time or times when plaintiff indicated that it was willing to accept any prudent and engineeringly sound alternative method of construction. Finally, such work as S.T.G. actually completed on the fender cells was performed inexpertly in certain respects as more particularly set forth heretofore in Findings No. 17(e), 21, 22, 33 and 38.

5. Since S.T.G. abandoned the job in October, 1960,[4] it may not recover on the theory of *quantum meruit* for any work which it has done and not been compensated for under the contract. In any event, there was no substantial performance by S.T.G. of any contract work for which it has not already been paid by plaintiff.

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[3]So far as I can determine, no trained engineer acting for S.T.G. inspected prior to bidding the available engineering drawings and other data.

[4]If it be argued that S.T.G. after October 27, 1960 made several attempts to resume its contract obligations, it is clear that S.T.G. rendered no actual performance under the contract after October 27, 1960.

Findings of Fact and Conclusions of Law—Opinion #34451—Tyler, J.

6. Continental is liable to plaintiff under its performance bond. Even though the performance bond provides by its terms that notice to the surety was waived, in fact the surety was given adequate and timely notice by plaintiff of the status of the contract beginning on or about September 18, 1960 and running right through to the completion date by SWP on July 5, 1962.

7. There is no persuasive evidence of any breach of contract on the part of plaintiff which would entitled S.T.G. to recover damages as it has contended in its counterclaim.

8. Continental offered no evidence that plaintiff certified any contract payments to S.T.G. after June 30, 1960 or that there were any amounts due from plaintiff to S.T.G. after that date. Thus, Continental's counterclaim for $17,247.00 has not been established.

9. S.T.G. has conceded liability to Continental for (1) any amount recovered by plaintiff herein against Continental and (2) all amounts paid by Continental to creditors and lienors of S.T.G.

Damages

1. Plaintiff is entitled to recover from S.T.G. and Continental as surety the sum of $100,843.50, which sum represents the cost to plaintiff above the original contract price for completion of Contract No. 3, with interest to be computed from July 5, 1962, the date of completion. *Elmohar Co. v. People's Surety Co.*, 217 N.Y. 289 (1916); *Juell v. New Amsterdam Casualty Co.*, 223 App. Div. 612, 229 N.Y.S. 190 (1st Dept., 1928); *Along-the-Hudson Co. v. Ayres*, 170 App. Div. 218, 156 N.Y.S. 58 (1st Dept. 1915).

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2. Plaintiff is not entitled to recover under its alternative theory the sum of $279,805.50, which is said to represent what it would have cost plaintiff above the contract price to complete the project in accordance with the original plans and specifications. The authorities cited by plaintiff for this theory are inapposite here where, as found by this court, plaintiff accepted a mode of completion of the fender system by SWP which created an end product of comparable value to plaintiff with that originally contemplated in Contract No. 3. Since plaintiff was obviously satisfied with the fender system as completed by SWP, to award plaintiff the higher cost based on the first, rejected bid of SWP would be to penalize defendant rather than fairly compensate plaintiff. See 5 Corbin, Contracts § 1002 (1964); McCormick, Damages § 137 (1935).

3. Plaintiff is not entitled to recover liquidated damages for the 645 days delay in the completion of the project. Pursuant to paragraph 2 of the contract, such damages were to be assessed at a rate of $250.00 per day. In fact, none of the delay here can fairly be charged to plaintiff; consequently, plaintiff has urged that defendants under this provision are liable for an additional sum of $161,250.00.

The general confusion in the law on the subject of liquidated damages has occasioned frequent comment in the New York cases. *E.g., Ward v. Hudson River Building Co.*, 125 N.Y. 230 (1891); *Jarro Building Industries Corp v. Schwartz*, 54 Misc. 2d 13, 281 N.Y.S. 2d 420, 422 (App. Term., 2d Dept. 1967). It is clear, however, that a primary determinant of enforceability of a liquidated damages covenant is the reasonableness of the amount therein stipulated. Moreover, this test is to be applied as of the date of execution of the contract. *E.g.,*

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Callanan Rd. Improvement Co. v. Colonial Sand & Stone Co., 72 N.Y.S. 2d 194 (Sup. Ct., Albany Cty. 1947); *Downtown Harvard Lunch Club v. Rucso, Inc.*, 107 N.Y.S. 2d 918 (Sup. Ct., N. Y. Cty. 1951). McCormick, Damages §§ 149, 150 (1935). The question to be asked, therefore, is whether the parties in negotiating Contract No. 3 made a reasonable estimate of the probable damages to plaintiff which would ensue from a breach by S.T.G.

I conclude that the $250.00 per diem assessment provided in paragraph 2 of Contract No. 3 does *not* represent a reasonable estimate of the compensable injury which would follow upon a delay in the completion of Contract No. 3 and especially the fender system portion of the project.

Appraising the reasonableness of a per diem assessment poses difficult problems. It is all too easy, for example, to be influenced by the seeming smallness of the sum, in light of the overall value of the contract, which is to be assessed for each day's delay. Exerting a contrary pressure in the enormity of the actual liability which results from applying the clause in a case, like the present one, of seriously protracted delay. This latter factor, while necessarily drawing scrutiny to the propriety of enforcement, is legally irrelevant standing alone since, as already indicated, the law requires evaluation of the prospective validity of liquidated damages clauses rather than their actual operation. *E.g., Downtown Harvard Lunch Club v. Rucso, Inc., supra* at 922-23.

To analyze the question of liquidated damages here, it might be appropriate to inquire whether or not in January, 1960 plaintiff and S.T.G. could have reasonably foreseen continually recurring injury of the types and magnitude described in paragraph 2 of the contract over the spectrum of possible periods of delay. If not, then the situation is closely analogous to that which

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arises when a single liquidated damage provision covers breaches of all conditions in a contract. In such cases, the New York courts have consistently held that "the strength of . . . [the] chain is that of its weakest link." *City of New York v. Brooklyn & Manhattan Ferry Co.*, 238 N.Y. 52, 56 (1924); *Seidlitz v. Auerbach*, 230 N.Y. 167, 173 (1920). If, then, it was unreasonable to foresee a continuing progression of daily injury of the stipulated magnitude for a year or two years, the clause must fall; it is not saved by the reasonableness of the estimate for delays of shorter duration.

Upon the facts of this case, it is difficult to understand how the parties could have reasonably contemplated damages of $161,500.00 for delay of 645 days by reason of S.T.G.'s inability to complete the fender cell portion of Contract No. 3. To illustrate this difficulty, there is no evidence from which it can be inferred that the parties reasonably expected that a delay in completion of the fender cells or any other aspect of Contract No. 3 would detain plaintiff from its contemplated possession and use of the new bridge. One of the stated "purposes" of paragraph 2's liquidated damage clause was to provide compensation for loss to plaintiff from its "inability . . . to enter into possession". Clearly, however, delay in completion of the outer fender cells would not and did not preclude plaintiff from possession or use of the new bridge.

Moreover, it is significant that neither the fender cells nor any other phase of the work projected in Contract No. 3 constituted an income producing asset of plaintiff. Thus, plaintiff could not have reasonably anticipated daily economic loss from inability to "use" the fender cells, for example, during a period of delay in completion, whatever its duration.

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The other stated purpose of the liquidated damages clause was to compensate plaintiff for interest payments on moneys borrowed for the construction project. Surely, plaintiff and S.T.G. could not have reasonably anticipated that interest charges totalling as much as $161,500.00 would accrue in relation to any borrowings attributable directly or indirectly to Contract No. 3.

Finally, consideration of other types of theoretically foreseeable damages such as increased insurance premiums in the event of collision or dredging damage and extra costs resulting from diversion of plaintiff's personnel from their normal duties cannot sustain an award of liquidated damages here. First and most obvious, the relevant language of paragraph 2 is silent on both headings of potential damage. Furthermore, the facts of this case strongly suggest that there were no practical bases upon which the parties could have sensibly thought in January, 1960 that substantial damages of these kinds would occur.

Thus, recovery under the liquidated damages clause is inappropriate here. To so rule, however, is not to conclude that plaintiff sustained no damage from the delay. *Compare J. Weinstein & Sons, Inc. v. City of New York*, 264 App. Div. 398, 35 N.Y.S. 2d 530 (1st Dept. 1942). See *Developments in the Law—Damages—1935-47*, 61 Harv. L. Rev. 113, 130 (1947). And, of course, it would be unfair to conclude without more that plaintiff has failed to prove any damages resulting from S.T.G.'s delay. Obviously, plaintiff proceeded to trial in reliance upon the liquidated damages clause. That reliance, from its standpoint, was hardly misplaced; the law is clear that one suing on a liquidated damage clause does not have to prove actual damages. *E.g., Norus v. McMechen*, 135 Misc. 361, 238 N.Y.S. 181 (Sup. Ct., Warren Cty. 1930); 14 N.Y. Jur., *Damages* § 172 (1960). Consequently, plain-

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tiff's counsel may notify this court and counsel for defendants within ten (10) days of the date of filing of this memorandum whether or not plaintiff desires to reopen the case to submit proof of damages resulting from S.T.G.'s delay.

Conclusion

From the foregoing findings and conclusions, it follows that:

A. plaintiff shall have judgment against defendants in the sum of $100,843.50, with interest thereon from July 5, 1962;

B. the counterclaims of defendants against plaintiff are dismissed;

C. Continental shall have judgment on its cross claim against S.T.G. in the sum of $118,904.04 plus any portion of the aforesaid judgment in favor of plaintiff which is paid by Continental, with interest from the date or dates when Continental paid such amounts on behalf of S.T.G.

Entry of these judgments, however, should be deferred pending resolution of the possible open issue of damages which plaintiff may elect to attempt to prove as flowing from S.T.G.'s delays in completing Contract No. 3.

Dated: New York, N. Y.
February 8, 1968.

H. R. TYLER, JR.
U.S.D.J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1492

S.T.G. CONSTRUCTION CO., INC., *Petitioner,*

against

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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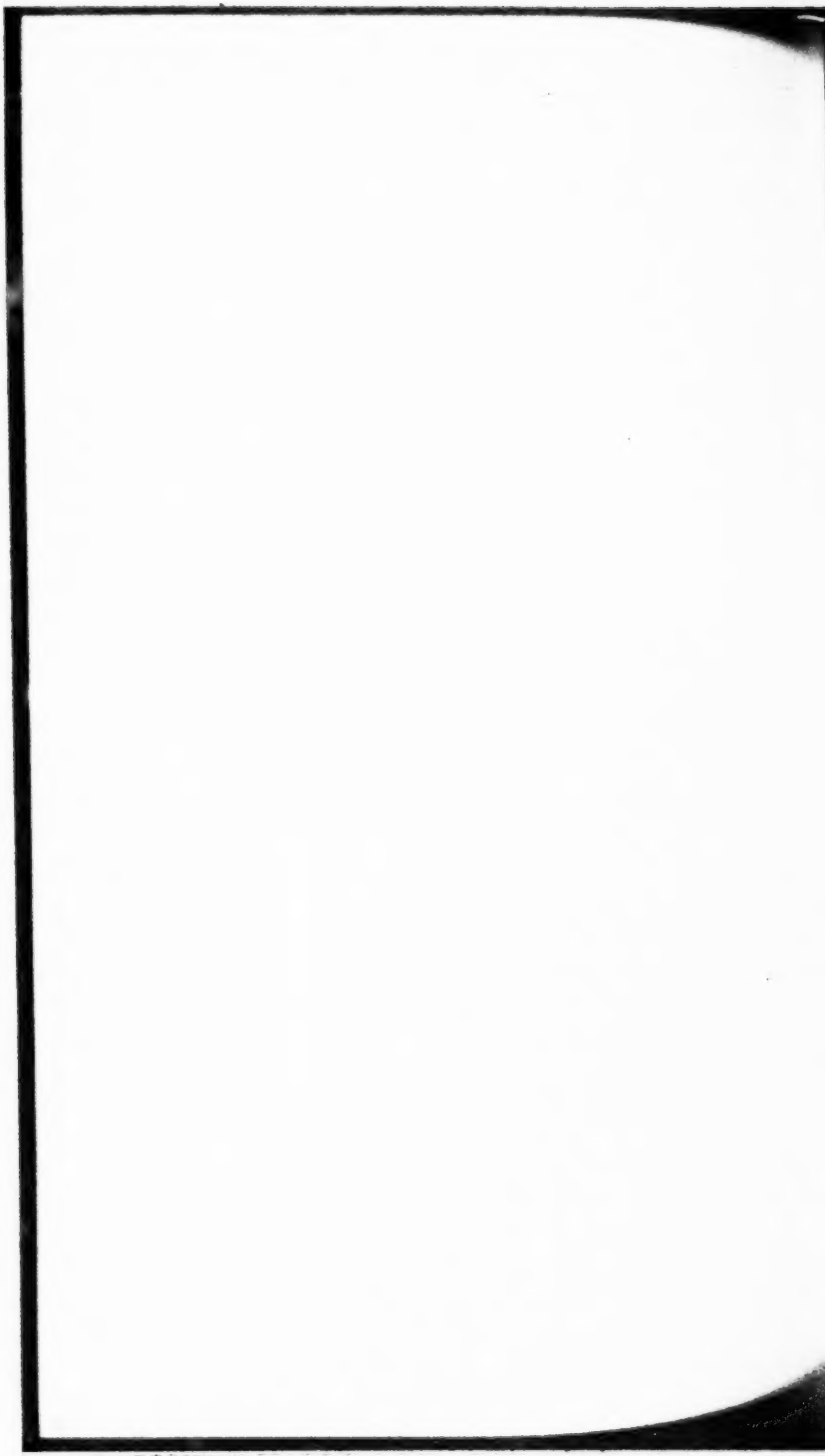

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BRIEF FOR RESPONDENT IN OPPOSITION

Preliminary Statement

S.T.G. Construction Co., Inc. (hereinafter "S.T.G."), one of the defendants below, has petitioned for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered on January 26, 1970, which affirmed a judgment entered on December 3, 1968 in the United States District Court for the Southern District of New York in favor of respondent, The Staten Island Rapid Transit Railway Company (hereinafter "S.I.R.T."), against petitioner and its surety, Continental Casualty Company, in the amount of $190,079.52. The judgment for plaintiff S.I.R.T. below was for completion costs arising out of S.T.G.'s failure to complete the work under a construction contract and

for actual damages suffered by S.I.R.T. by reason of the delay in completion.

The surety on the performance bond, Continental Casualty Company, which was an appellant in the Court of Appeals, petitioned that Court for a rehearing, but its petition was denied on February 24, 1970. Continental Casualty has not joined S.T.G. in this petition for a writ of certiorari. Therefore, the judgment has become final against it.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported in 421 F.2d 53 (2d Cir. 1970). The Memorandum Opinion and the Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of New York are unreported (Appendices D and F to petition).

Questions Presented

The questions suggested by S.T.G. are not fairly presented in that they incorporate, as factual premises, issues which were disputed in the Courts below and which were found against S.T.G. in the Trial Court and in the Court of Appeals. S.T.G. in its suggested questions refers to "detail specifications" as "concededly dangerous and impracticable" and to "the owner's admittedly defective detail specifications". There were no such concessions or admissions. The Trial Court found as a fact that the contract plans and specifications were practical and possible of performance by a competent contractor (Appendix F, pp. 50a, 51a) and the Court of Appeals agreed, specifically rejecting the argument that the railroad had supplied defective plans (Appendix A, p. 7a).

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The questions to be considered are:

1. Whether the Courts below were justified in finding as a fact that the contract plans and specifications relative to the fender system were feasible, practicable and possible of performance by a competent contractor and in their finding that S.T.G. was free to use any engineeringly sound and approved method to accomplish the end result, which was penetration of sheet pilings to specified elevations (810a).*

2. Whether the Courts below were justified in concluding that S.T.G. had failed to complete its contract, had in fact abandoned the work, and that S.I.R.T. was entitled to recover the cost of completion of Contract No. 3 above the original contract price (811a-812a).

Statement of the Case

The action was brought to recover damages incurred by reason of the defendant S.T.G.'s failure to complete a contract with S.I.R.T. for the demolition of an old pier structure in the middle of a navigable tidal water course, known as Arthur Kill, between Staten Island, New York, and New Jersey, the demolition of an old trestle and the construction of a system of fender cells to protect Pier No. 1 of the railroad bridge over the said Arthur Kill (5a-13a). Pier No. 1 had been built by another contractor. The Surety was sued on its performance and payment bond posted to S.T.G. under the contract (13a).

The case was tried without a jury before District Judge Harold R. Tyler, Jr. who found that S.T.G. had breached its construction contract by failing to complete the work required thereunder, that the contract plans and specifica-

*Unless otherwise indicated, references are to pages of the Appendix submitted to the United States Court of Appeals for the Second Circuit, which was submitted to this Court by the petitioner.

tions were feasible, practicable and possible of performance by a competent contractor and that the additional cost to the railroad over and above the original contract price came to $100,843.50, which plaintiff was entitled to recover against both defendants (Appendix F, p. 52a; 812a).

The Trial Court also held that the railroad was entitled to recover additional damages from the defendants for delay in the total sum of $36,416.04 (Appendix D, p. 23a; 991a). The Court of Appeals for the Second Circuit affirmed the judgment of the District Court in all respects.

The formal contract known as Contract No. 3 was entered into in writing between S.I.R.T. and S.T.G. on January 18, 1960 (Exhibit A, 999a-1034a). The contract was accompanied by and embraced by its terms specific plans which set forth S.T.G.'s basic responsibilities to achieve the work desired to be accomplished (Exhibit 1, 997a-998a).

One of the items of work required to be performed by S.T.G. was the construction of a series of eight cells flanking Pier No. 1 of a new bridge. The contract plans and specifications called for the erection of five of the cells designated as A, B, C, D and E along the northerly side of Pier No. 1 and three of the cells designated as F, G and H along the southerly side. Each of the cells was to be cylindrical in shape and approximately 27 feet in diameter. The circumference of each cell was to be constructed of interlocking sheet steel pilings, about 15 inches in width, which were to be anchored in the channel bed or driven to required tip elevations; some were to be driven merely to rock, but the sheet pilings for the cells nearer the channel, D, E, F and G were required to penetrate the rock to the extent necessary to permit the sheets to penetrate to the required tip elevations. The areas of the cells within the outer circumference of sheet piling were

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to be excavated and then filled with a heavy substance, such as broken stone or concrete and broken stone (795a).

The pertinent sections of the Contract Specifications relating to the construction of these fender cells are Article 2 (p. II-1), Article 4 (p. II-1) and Article 5 (p. IV-3) (1029a-1034a). From these it will be noted that the material inside the cells was merely to be excavated to good earth with rock to be removed, if necessary, to enable driving the sheet piling to the elevation shown on the drawings, except in Cells D and E, where rock was to be excavated to the extent necessary to permit driving the sheet piling to the required tip elevations as shown on the drawings (795a, 797a).

The contractor was required to protect the sides of the excavation with suitable sheeting, shoring and bracing, except that with the approval of the Engineer the contractor was allowed to slope the sides of the excavation instead of providing such protection (1029a).

The only problem was the excavation of rock in Cells D and E by an approved method to the extent necessary to permit the sheets to penetrate to the required tip elevation (796a-797a). The specifications contemplated as the recommended procedure excavation of rock in the dry with blasting to be employed adjacent to Pier No. 1 (Section II, Article 4 of Exhibit 2). The contract did not require this method. Section IV, Article 5 of the contract (Exhibit 2) provided only that rock shall be excavated "by an approved method" and that the work "shall preferably be done in the dry," requiring only that the sheet steel be driven to required elevations. The contract also provided in the same Article that the contractor was to submit for approval the method he proposed to use for the construction of the steel sheet piling cells (797a).

Admittedly, S.T.G., through its representatives, visited the work site on only one day before preparing its bid

(496a, 799a). It did not inspect the available core borings nor did it examine the information relating to the construction of Pier No. 1 which was available along with the core borings at S.I.R.T.'s Staten Island office (500a, 799a). This information and the plans for Contract No. 3 revealed that the existing sheet pilings surrounding Pier No. 1 were driven only to rock, that the pier foundation itself was at an approximate elevation of minus 50 feet below mean low water and that the foundation for Pier No. 1 had been constructed in the dry (799a).

Counsel for S.T.G. urge that the plans and specifications were defective and dangerous to complete because the railroad had specified how blasting should be done, if used adjacent to Pier No. 1. The use of blasting procedures is described by counsel as a dangerous and impossible operation, because a "blow" (a rush of water into the excavation) might occur in using this dry method of construction. They ignore the fact that S.T.G. did not choose the dry method and never attempted to use any blasting procedures, although their own expert testified that the tests showed good rock in the area (430a-431a) and that blasting could be performed immediately adjacent to most sensitive construction, such as pipes and walls (436a-437a).

The evidence conclusively disposes of the unfounded claim that the contractor was bound to excavate in the dry, because S.T.G. itself had no trouble whatsoever in interpreting the plans and specifications to mean that it could accomplish the excavation of the rock either in the wet or in the dry and with or without blasting procedure (69a, 70a, 80a, 81a; Exhibits 7 & 8, 1039a, 1040a).

S.T.G. recognized that it could choose its own construction method and accordingly submitted a sketch and blue print dated February 26, 1960 which set forth a method of pre-drilling along the perimeter of Cells D and E, and F if required, and then driving sheet piling to the required

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tip elevations (Exhibit 8, 1040a). S.T.G.'s president testified (487a, 488a):

> "Q. Did this letter and the enclosed sketch (referring to Exhibits 5 and 8) include a proposal for a construction method by which that sheeting was to get down to minus 45 or minus 40 as the case might be? A. Yes, sir.
>
> "Q. This was the method that S.T.G. Construction Company thought to be feasible and practical for accomplishment of the desired result; is that right?
>
> A. Yes, sir."

This method was approved as generally satisfactory by the railroad's representatives (488a). It was a so-called "wet" method of construction of the cells requiring no blasting and eliminating any question of a blow from lateral pressure. Counsel for S.T.G. refused to face up to the fact that the contractor itself recognized that it could proceed by any approved method of obtaining the desired result, either in the wet or in the dry, and with or without blasting procedures. The wet method suggested by S.T.G. and approved by the railroad eliminated any possibility of a so-called blow and the potential danger which counsel refer to so often, without their mentioning that S.T.G.'s suggested construction method was in the wet and without the use of blasting.

S.I.R.T.'s expert witness, Professor Rutledge, described three permissible methods of construction under the contract and specifications, one of which was the method selected by the contractor S.T.G. However, S.T.G. did not have the competency to carry out its own selected method (Appendix F, p. 41a). A second method was a construction in the dry, using a double cofferdam which eliminated the possibility of a blow of the cell, i.e., the inrush of water and soil as a result of lateral pressure. This was the method suggested in the specifications. A third method

was the simple "glory-hole" method of excavating in the wet with a dredge and then excavating the rock. The contract contemplated this method by providing that the contractor could slope the sides of the excavation (1029a).

The efforts of S.T.G. to comply with its own suggested method of excavating a trench in the rock so that the sheet piling could be placed therein in Cells D and E were almost incredible. The contractor during the 240 days of the contract period attempted only to drill holes in the rock for Cell E. S.T.G. was able to drill holes into the rock with the auger and churn drills but was unable to keep the holes in alignment through the overburden and into the rock (801a).

S.T.G.'s expert, Dr. Feld, admitted that the problem was not the ability to drill holes in the rock but the inability to keep the holes in alignment, so that a trench could be created (434a). Professor Rutledge explained how this could have and should have been done (598a-607a, Exhibits 119A, B, C and D, 1115a-1118a).

In August 1960, S.T.G. admitted its inability to place the fender sheets according to its own selected method. Some of the sheet piling was put in backward (191a, 192a). Interlocks were broken and the cells lost a considerable percentage of their desired and specified strength (192a). The top of the sheet pilings indicated the severe hammering to which they had been subjected and they were bent and distorted below water (191a, 311a, 319a and 320a). The representatives of S.T.G. then criticized the method of construction suggested in the specifications but S.I.R.T., the Army Engineers and the architect-engineer reminded S.T.G. that it had not even attempted the recommended blasting procedure (518a). They directed S.T.G. to complete the job. Only then did S.T.G. obtain an estimate as to the cost and method of blasting but never attempted it (522a-523a).

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The Trial Court found that there were at least three practical and feasible construction methods by which a contractor such as S.T.G. could have constructed the fender cells D, E, F and G under the original plans and specifications. They are described and summarized in the Findings of Fact and Conclusions of Law (Appendix F, pp. 42a, 43a; 802a, 803a) as (1) a wet construction method, known as the "glory-hole" method, a simple dredging job with the creation of a trench under water by drilling and blasting, then setting the sheet pilings in place; (2) another wet method, the pre-drilling method proposed and attempted by S.T.G., but by utilizing a proper template as a guide for driving interlocking casings, then breaking down the web between the holes, creating a trench into which the sheets could be driven, and (3) a dry method of construction utilizing a cut-off wall or exterior cofferdam outside of the fender cells, which would eliminate the possibility of a blow. This was the method suggested by S.I.R.T. There was adequate support for these findings by the Trial Court in the evidence, particularly the testimony of Professor Rutledge (598a-607a, 1115a-1118a).

S.T.G. makes no claim that these findings of the Courts below were clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Procedure. In fact, the findings were clearly correct.

Professor Rutledge testified that the use of a double cofferdam or of a dredge or of a proper template for predrilling were construction methods which are not set forth in plans or specifications (612a). Two of such construction methods contemplated blasting and Professor Rutledge said that they were entirely safe (598a-611a). S.T.G.'s counsel, nevertheless, persist in the statement that this contractor had no choice but to resort to unsafe blasting methods despite the findings of fact, with supporting testimony, that blasting could be safely used. Further-

more, the contractor decided on his own initiative to use the pre-drilling method with no blasting contemplated so that the phantom danger of blasting conjured up by its counsel does not fit the facts.

S.T.G. impliedly admits the use of a double cofferdam was feasible but now urges that this construction method should have been in the specifications. The testimony is clear that construction methods are not set forth in specifications (612a). It is also clear that, if desired, blasting in the dry could have been used with complete safety, with the protection of the double cofferdam.

S.T.G. also urges that a cofferdam could not be employed because it might interfere with navigation in the channel (Petition, pp. 13, 14). This statement is wholly unfounded. There was no channel at the time and place of this construction (997a). The row of piles would be temporary and removable and would not be in the channel as it then existed. The dredging was to be done after completion of the work.

The finding of the Trial Court concurred in by the Court of Appeals that the contract plans and specifications were feasible, practicable and possible of performance by a competent contractor, coupled with the finding that S.T.G. was free to use any engineeringly sound and approved method to accomplish the end result of penetration of the sheet pilings to desired elevations, supported by persuasive and substantial evidence, makes it unnecessary to discuss S.T.G.'s artificial argument that the contract set forth a detailed specification which S.T.G. was required to follow in performing its work. S.T.G. ignores the finding that blasting could have been safely used if desired; it ignores S.T.G.'s own interpretation of the contract, clearly establishing the flexibility of the contract in use of construction methods; it ignores the testimony of Professor Rutledge that it was entirely safe to blast even in the dry by use

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of the double cofferdam and in the wet, of course, with no danger whatsoever; it ignores the finding by the Trial Court that S.T.G. was free to use any approved method to accomplish the end result.

Introduction To Argument

The petition seeks to raise questions of law based on factual premises which are diametrically opposed to the facts as found by the Courts below. No claim is made that the facts as so found are clearly erroneous, and none could be made. In the light of this, the petition states no grounds upon which this Court should grant certiorari.

ARGUMENT

I

No important question of federal law is involved.

S.T.G.'s petition states as its first reason why certiorari should be granted that there is an important question of federal law involved. The argument seems to be that the Government is involved in public construction so that the interpretation of every construction contract involves a question of federal law. This is a strained effort to support the claim that an important question of federal law is involved. If there were any substance to this claim, the interpretation of every private construction contract would be a likely subject for review in this Court.

This Court on occasion has accepted cases involving the interpretation and administration of federal contracts, where there was a recurring problem. See *United States v. Utah Construction & Mining Co.*, 384 U. S. 394 (1966). However, this action does not involve a federal contract or the interpretation and administration of a typical form

of federal government public construction contract. The contract, to which New York law was held applicable (Exhibit 2, 999a-1034a), was between S.I.R.T. and S.T.G. The railroad, as the bridge owner, prepared the plans and specifications for the new bridge. The U. S. Government was not a party to the contract. There was a separate agreement for reimbursement of S.I.R.T. for a percentage of the project cost in accordance with the Truman-Hobbs Act. 54 Stat. 497, 33 U.S.C. §§511-523. The Truman-Hobbs Act is applicable to the limited situation where an existing bridge over a navigable stream constitutes an obstruction to Navigation.

Jurisdiction in the federal court in this case was based upon diversity of citizenship, not upon the involvement of any federal question (Appendix A, p. 1a). The Trial Court found without dispute (Appendix F, p. 50a):

> "1. The law of New York applies to this controversy."

It is clear that the Courts below have not decided an important question of federal law, which has not been, or should be, settled by this Court.

> *S.T.G.'s claim that this Court should determine as a matter of federal law that the specifications in this case were detailed specifications and not a result specification is wholly untenable.*

It is a completely artificial argument of S.T.G. that a question of federal law is involved in determining whether the specifications in this case were detailed specifications or "result" specifications, verbiage which is substantially the invention of the petitioner.

Fundamentally, contract plans and specifications are those which do not permit the contractor to depart from them in any respect or those, as in this case, which are flexible and permit the contractor to use any approved

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method of construction to achieve the end result. These are not "result" specifications, except in the sense that all specifications are directed toward an end result. Basically, S.T.G. claims that the specifications were "admittedly defective" in that blasting was recommended and blasting was "concededly" dangerous and impracticable. The specifications were not defective, nor was there any admission to that effect; the specifications were not dangerous or impracticable and there was no concession to that effect. The finding of fact by the Trial Court was precisely the opposite, namely, that the contract plans and specifications relative to the fender system were practicable and possible of performance by a competent contractor (Appendix F, p. 50a; 810a). The Trial Court also found as a fact that neither the plans and specifications by their terms nor the exigencies of underwater engineering and construction precluded S.T.G. from proceeding to completion by means of one of at least three acceptable methods, to which we have heretofore referred (Appendix F, pp. 50a-51a).

The Court of Appeals found the District Court's view of the case convincing. It stated that the contract apparently contemplated the use of blasting to sink the pilings, but there was also evidence to indicate that the contract need not be read as requiring such a method. Said Court referred to Section IV, Article 5 entitled "Construction Methods," and interpreted it as providing only that rock shall be excavated "by an approved method" and that the work "shall preferably be done in the dry", and requiring otherwise only that the sheet steel be driven to required elevations (Appendix A, p. 7a).

It would seem to serve no useful purpose to comment on the arguments in the petition dealing with government financed competitive contracts, novel and developmental contracts, subsidiary design obligations and definitions of detailed and result specifications because all of these argu-

ments are based on the claim that there was a rigid but defective design. This has been heretofore pointed out as simply not the fact. The completely erroneous statement in the petition is repeated several times (pp. 2, 3, 25) that the only issue in the case is whether the railroad should be held responsible for the "admittedly faulty specified procedures for constructing the cells by sinking the sheet piles into rock." This issue is precluded by the findings below.

In connection with S.T.G.'s claim that the specifications should be interpreted as detailed specifications, S.T.G. states that a cardinal rule of interpretation is that there is no surer way to determine the meaning of a contract provision than to see how the parties have interpreted or have acted under it (Petition, p. 29). In that connection, we call attention to S.T.G.'s interpretation of the contract by submitting as its proposed plan of procedure a pre-drilling method of excavating a trench in the rock, which method was approved. This method was not the plan of procedure recommended in the plans and specifications. This method did not require blasting, so that the flexibility allowed to the contractor was demonstrated by its own interpretation.

Thus, there is no factual support whatsoever for S.T.G.'s claim that the specifications set forth procedures to be strictly followed for achieving rock penetrations of the sheet piles.

There is no important question of federal law involved in the interpretation of this contract and the requirements thereunder. There were only issues of fact which were decided adversely to S.T.G.'s claims by the Courts below.

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II

The Court of Appeals has not decided a federal question in a way which conflicts with decisions of this Court.

S.T.G. refers to *U. S.* v. *Spearin*, 248 U. S. 132 (1918), in an attempt to show a conflict on a federal question between the decision below and decisions of this Court. *Spearin*, where a government contract was involved, is entirely consistent with the decision of the Court of Appeals. In that case the contractor agreed to build a dry dock in the Brooklyn Navy Yard in accordance with plans and specifications provided by the Government. There was a provision for reconstructing a sewer which intersected the site. The contractor followed the plans and specifications and rebuilt the sewer, but back waters burst the new sewer during heavy rain and high tide. The case held that, if the specifications were complied with, there was a warranty that the sewer would be adequate and that the contractor was entitled to recover damages.

Spearin is inapposite because there the contractor followed the plans and specifications, whereas S.T.G. did not attempt to construct the fender system in accordance with the plans and specifications provided. Instead, S.T.G. submitted its own pre-drilling plan which was approved, but S.T.G. could not perform. If, in our case, S.T.G. constructed the fender system in accordance with the contract plans and specifications provided and then the fender system failed, the holding in *Spearin* might have some relevance. However, in view of the fact that the specifications were not required to be followed and the fact that S.T.G. never attempted to follow them, *Spearin* is simply not in point.

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The only other authority for the assertion that the decision below is in conflict with decisions of this Court is a reference by S.T.G. to a footnote in a Court of Claims case (footnote 6 in *National Presto Industries, Inc.* v. *U. S.*, 167 Ct. Cls. 749, 338 F.2d 99, 104 [should be 105], *cert. denied* 380 U.S. 962 (1965)). The footnote reference is to a District Court case. There was no holding in *National Presto* that there were faulty specifications. On the contrary, the Court held that it could not find any warranty or representation by the Government as to equipment to be used in the manufacture of shells. The Court did find a mutual mistake of the parties to the contract and reformed it.

The decisions in the District Court and the Court of Appeals in this case appear to be in harmony with the views of this Court as is indicated in the case of *Norfolk Dredging Co.* v. *U. S.*, 175 Ct. Cl. 594, 360 F.2d 619, *cert. denied* 385 U. S. 919 (1966). There the contractor was to construct a levee of hydraulic fill pumped from adjacent areas designated by the Government. The project was in tidal waters and the plaintiff had difficulty with the conventional method of procedure using a fixed shore pipe line. It used a method called a floating, swinging pipe line and claimed a change in specifications and an adjustment in the price. The Court of Claims referred (175 Ct. Cl. at 605) to the contract specifications which read in part: "The Contractor shall use bleeder pipes, spoons, baffles, *or other devices* during the placing of the hydraulic fill • • •."

The Court of Claims agreed with the Government's views that freedom of choice of means was indicated by the phrase "in such a manner" to achieve a gradual building up of the face of the fill, referring to the conduct of the hydraulic filling, and that freedom of choice was further indicated by the phrase "or other devices" where the con-

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tractor was directed to use bleeder pipes, spoons and baffles.

The Court of Claims said in *Norfolk*, that the contractor's basic responsibility was to achieve a prescribed end result in whatever manner the contract did not expressly prohibit (175 Ct. Cl. at 607). That is precisely the situation in this case where the end result was the placing of the fender sheeting into rock to prescribed elevations to stabilize the cells and no method of achieving this result was prohibited. The freedom of choice of S.T.G. to excavate in the dry or in the wet was clearly established, not only from S.T.G.'s choice to use a wet method of construction but from the very text of the specifications which provide in part for excavation of rock "by an approved method" and "[t]his work shall *preferably* be done in the dry, • • •" (emphasis supplied).

III

The decision by the Court of Appeals is not in conflict with the decision of another Court of Appeals.

The petition does not refer to any decision by any Court of Appeals that conflicts with the decision below. The petitioner resorts to the claim that the decision of the Court of Appeals in this case conflicts with cases determined by the Court of Claims. The Court of Claims cases cited (Petition, p. 30) are inapposite in that they are cases where there were admittedly faulty specifications with change orders involved or where the contractor had performed in accordance with the specifications and the desired result had not been obtained, which was the factual situation in *U. S.* v. *Spearin, supra.* A Court of Claims case cited by S.T.G. is *J. D. Hedin Const.* v. *U. S.*, 171 Ct. Cl. 70, 347 F. 2d 235 (1965). This case and *J. L. Simmons*

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Company, Inc., 67-1 BCA 29, 417, also relied upon by S.T.G. to support its claim that a contractor should not be held responsible for results where the achievement has been rendered impossible by the Government's own specifications, were substantially identical cases in that they arose from use of the very same piling specifications. The basic question in those cases was whether the specifications for the piling were design specifications for which the Government should have been held to assume complete responsibility. The Board of Contract Appeals in *Simmons* said that under the change order in effect the type of piles to be used and the driving requirements for both types of piles "became fixed and absolute to the degree that the contractor had no right or obligation to depart from the terms specified in the change itself" (29,420). This was obviously a design specification and not related to the type of specification in our case. Incidentally, Professor Rutledge and a Mr. Fletcher, witnesses for S.I.R.T. in this case, were witnesses in *Simmons*, and the Board accepted their testimony in *Simmons* as did the Trial Court in our case. The specifications were entirely different.

Consequently, there is no conflict in the decision of the Court of Appeals for the Second Circuit in our case, not only with any case decided by another Court of Appeals but also with cases determined on public construction law by the Court of Claims and the Board of Contract Appeals.

IV

The decision in the Court of Appeals was not a determination of an important state question in a way in conflict with the applicable state law.

The New York State authorities referred to in the petition as indicating a conflict between the decision below and leading case law in the State of New York are not

even remotely related to the issues in this case. The petition asserts that the New York Court of Appeals has held that a result specification should be expressed in the clearest language and cites the case of ***Sweezy*** **v.** ***O'Rourke,*** 226 N. Y. 378, 123 N.E. 752 (1919). It was held therein that a contractor who agreed to drill an artesian well until the pipe reached "water-bearing gravel" had completed his contract, although salt water was produced, because the well driller did not warrant that fresh water would be obtained. That case has nothing to do with a so-called result specification and is in no way in conflict with the decision in this case.

The petitioner also refers to *Cassoff* v. *State of New York,* 44 N.Y.S. 2d 514 (Ct. Cl. 1943), as support for the assertion that a result specification must be clearly stated. There is no such holding in *Cassoff*. The Court of Claims merely stated in its short opinion that if a specific result is contracted for then it must be performed before the claimant is entitled to payment.

Petitioner also lists *Gillet* v. *Bank of America,* 160 N. Y. 549, 55 N.E. 292 (1899), and *Atterbury* v. *Bank of Washington Heights of the City of New York,* 241 N. Y. 231, 199 N.E. 841 (1925) (Petition, p. 18), presumably supporting the same assertion. Again, they are not remotely related to the issues in this case.

Since the decision of the Court of Appeals below is clearly correct, S.T.G.'s petition for certiorari should be denied.

Conclusion

For the foregoing reasons, it is respectfully submitted that S.T.G.'s petition for a writ of certiorari should be denied.

Dated: May 22, 1970.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1492

S. T. G. CONSTRUCTION CO., INC.,
Petitioner,

against

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER

EMANUEL HARRIS,
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REPLY BRIEF FOR PETITIONER

The issue on which petitioner seeks certiorari is established by respondent's statement that, although the specifications set up a "recommended procedure" for excavation within the cells and blasting, the contract did not *require* this method (Resp's Br. p. 5).

The fact is that the specifications did not merely recommend a construction procedure, but specified the construction method with which the contractor was required to strictly adhere (1003a).

The issue fairly stated was whether petitioner properly believed it was to follow the specified construction method prepared by respondent's architects-engineers. If so, peti-

tioner could rely on respondent's implied warranty that satisfactory performance would result. *U. S.* v. *Spearin*, 248 U. S. 132 (1918). Indeed, even if it was only a recommended procedure, the contractor would be entitled to rely on its efficacy. *Green* v. *City of New York*, 283 App. Div. 485 (1st Dep't, 1954).

Respondent states that, as the Trial Court found, there were three construction methods by which the cells could have been driven into rock "under the original plans and specifications" (Resp's Br. 9, top). Certainly none of these methods was specified. Respondent's architects-engineers, who specified definite, impracticable work procedures, and failed to redesign them when requested, only advanced these three construction methods at trial some seven years later.

Respondent argues that they did not have to be since customarily "construction methods are not set forth in specifications" (Resp's Br. 9-10). This is, inherently, a concession that they were not specified.

Here then is the simple, basic fallacy of respondent's entire case: how can they argue that construction methods are not set forth in specifications, and, therefore, not set forth in these specifications, when these specifications so plainly set them forth? Section IV, Art. 5 is entitled "CONSTRUCTION METHODS" and states that the cells shall be driven into rock, the earth in the interior of the cell excavated and that the rock shall then be excavated by an approved method, preferably in the dry, by conforming to procedures set forth in Section II, the section covering rock excavation procedures (1033a, 1034a).

Section II, Art. 4 sets forth the "METHODS AND PROTECTION" for excavating the 10 foot trench into the rock, specifically requiring blasting beneath the in-place tips of the sheet piles, enumerating precautions to be taken in blasting, and requiring the contractor to submit a plan setting forth blasting procedures (1003a).

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Thus, respondent interprets the specifications as providing no construction methods, placing on the contractor the responsibility of finding a method to achieve the result of sinking the sheet pile into rock. Petitioner, on the other hand, relies on the wording of the specifications, which expressly sets forth a definite construction method, and requires the contractor to perform strictly in accordance with such specifications. Respondent seeks to avoid the inconsistency between its position that specifications do not set forth construction methods, and the obvious fact that this specification does, by claiming that the specified method was only a recommended procedure for which respondent assumed no responsibility.

Despite its argument that specifications are not supposed to set forth construction methods, respondent thereafter admits that there are contract plans and specifications "which do not permit the contractor to depart from them in any respect" (Resp's Br. 12). This is only partially true. Detailed specifications may place certain responsibilities on the contractor, within the framework of the specified design (See Petition 18-20). In our case, the contractor was obligated to come up with a blasting plan consistent with specified procedures.

Respondent then distinguishes our contract from such a detailed specification by stating, without any basis therefor in the contract, that it permitted "the contractor to use any approved method of construction to achieve the end result" (Resp's Br. 12-13). To do this, respondent twists the language of the specifications requiring that blasting within the cell "preferably be done in the dry" (Section 4, Art. 5, 1034a)—an undisputed reference that the water filling the cell after excavation should, if possible, be pumped out before blasting, rather than to have divers blast under water (412a, 415a-417a, 458a, 443a-444a)—claiming this permitted the contractor to use any "wet" method. Respondent then simply argues that any other method would be a "wet" method, and, therefore encompassed under the specifications.

Of course, the only relevant issue is whether the respondent was responsible for the method expressly specified in the contract. If so, the feasibility of any other methods suggested by respondent is irrelevant, as well as being suspect by the fact that they were not timely suggested, and the further fact that the work was eventually performed by an entirely different design, which eliminated the requirement to sink the sheet piles into rock.

One of the methods, designated as a "wet" method by respondent was the "glory-hole" design, whereby the entire area of earth over-burden would be excavated before constructing the cell. This was diametrically contrary to the specifications requirement that each cell be first formed by driving the sheet piles and then excavated only within its circumference leaving the earth outside to support it. However, simply by calling it a "wet" method, respondent urges that it complied with the plans and specifications (Resp's Br. 9).

Respondent also claims that the method of pre-drilling through 35 feet of earth overburden into the rock so as to effect the ten foot trench in the rock, even before driving the piles and excavating within the cell, was a "wet" method. That method is actually the very antithesis of a "wet" method, since the rock would be excavated before the earth was removed, thus eliminating the flow of water into the excavated cell before rock excavation which would occur under the contractually specified method.

The Court of Appeals was confused into believing that the fender cells were to be installed in an existing water area, rather than, as conceded, in an existing land area. Consequently, its decision refers to drilling, "under water" to bedrock (Petition, 5a), whereas, such drilling was actually to be through 35 feet of earth overburden directly into underlying rock. Further, proof of this basic misconception by the Court of Appeals is that, in listing the work procedures as specified, it overlooked the whole excavation

operation, stating that the cells where to be driven to bedrock and then drained of water (Petition, 4a).

Respondent improperly argues that petitioner by eventually recommending a pre-drilling method, thereby admitted that the pre-drilling operation was encompassed by the specified design. The undisputed testimony was that petitioner only recommended a form of pre-drilling after it had ascertained that the designed procedures were dangerous and unworkable, and after respondent's representatives had approved such method and requested petitioner to present it as a *substitute* plan. (363a-367a, 534a-543a)

The concept of excavating the rock by pre-drilling was clearly contrary to the specified procedure in that it required the rock to be excavated, by drilling, not blasting, before rather than after the driving of the sheet piles and the excavation of the cells, thus elementary specified dewatering operations. Since it is the complete reverse of the specified method of procedure, pre-drilling cannot be said to have been intended under the contract.

Respondent's argument that petitioner was incompetent in utilizing the pre-drilling operations is belied by the fact that petitioner used the reputable firm of Spencer, White and Prentis, respondent's own completing contractor, which was only able to drive one and one-half unaligned holes with a 16-inch drill through the 35 feet of overburden. (181a-183a, 385a-386a, 556a-557a)

The third, unspecified method, utilizing a double cofferdam, is discused at page 13 of the petition.

The Petitioner's Failure to Blast

Respondent's brief does not dispute the fact that all the experts involved stated that blasting under the specified procedures would be dangerous and impracticable. (Petition, 5-6) Consequently, respondent's reference to "the phantom danger of blasting", and its insistence that peti-

tioner "never attempted to use any blasting procedures" (Resp's Br. 6-10) is unsupported verbiage, and meaningless. Such undisputed testimony that a dangerous "blow" would result if the work was performed expressly as designed, is the basis for petitioner's statements that the specified procedures were concededly faulty.

The Federal Question Involved

Petitioner requests certiorari on the basis that a specification so plainly detailing the method of procedure constitutes an implied warranty that such specified method will work. In view of the decisions of this Court in *U. S.* v. *Spearin, supra,* as well the many similar decisions of the Court of Claims in actions involving federal public works, and the government's direct interest in this case by reason of its agreement to pay 82½% of the cost under application of the Truman-Hobbs Act (which required competitive bidding), we submit that a basic question of federal law is involved.

Respondent's attempts to distinguish *U. S.* v. *Spearin* on the ground that there the contractor did follow plans and specifications, "whereas, S.T.G. did not attempt to construct the fender system *in accordance with the plans and specifications provided*"—an interesting admission in itself. (Resp's Br. 15, emphasis supplied) Respondent's argument that petitioner would have had to undertake and fail in an admittedly dangerous and impracticable operation in order that *Spearin* apply is patently ridiculous. (See Petition, 24-25.)

Respondent, not being able to distinguish *J. D. Hedin Construction* v. *U. S.*, 171 Ct. Cls. 70, 347 F. 2d 235 (1965) and *J. L. Simmons Co., Inc.*, 67-1 B.C.A. 29,417, dismisses them with the gratuitous statement that, unlike our case, they obviously involved a "design specification" (Resp's Br. 18). The specification in those cases imposed on the contractor even more responsibility and flexibility than petitioner had. Respondent's reference to the fact that

Dr. Rutledge was a witness for Simmons only points up the inconsistency of his testimony; there he claimed the contractor was given a detailed specification warranted by the owner; here, contrarily, he testified that construction methods are not set forth in specifications (612a).

Norfolk Dredging Co. v. *U. S.*, 175 Ct. Cls. 594, 360 F. 2d 619 (1966), the only case cited by respondent on the point, involved a unique situation wherein the government gave the contractor complete information showing that hydraulic fill to be poured in a tidal basin would be subject to locations where the bottom, being very soft and spongy, could cause the hydraulic fill to sink if poured in one spot. This necessitated pouring through a swinging pipe rather than a fixed pipe in order to spread the fill. The Court properly held that since the specifications provided that the contractor "shall" use "other devices" in addition to pipes under such circumstances, the contractor had been advised of, and had assumed responsibility to use, such devices where necessary to achieve the result. This, then was one of those novel situations where an end result was specified (Petition 17).

CONCLUSION

For the foregoing reason, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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